THE

CONSTITUTIONAL PROVISION

RESPECTING

FUGITIVES FROM SERVICE OR LABOR,

AND THE

ACT OF CONGRESS,

OF

SEPTEMBER 18, 1850.

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But is THIS law?
Hamlet, Act V., Sc. I.

BOSTON:
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CONTENTS.

Act of Congress of 1793.

An Act respecting Fugitives from Justice, and persons escaping from the service of their Masters.

Sec. 1. *Be it enacted by the Senate and House of Representatire of the United States of America in Congress assembled*, That whenever the executive authority of any State in the Union, or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such State or Territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made before a magistrate of any State or Territory as aforesaid, charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the Governor or chief magistrate of the State or Territory from whence the person so charged fled, it shall be the duty of the executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear; But if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory.

Sec. 2. *And be it further enacted*, That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or Territory from which he or she shall have fled. And if any person or persons shall by force set at liberty, or rescue the fugitive from such agent while transporting, as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year.

Sec. 3. *And be it also enacted*, That when a person held to labor in any of the United States, or in either of the Territories on the northwest or south of the river Ohio, under the laws thereof, shall escape into any other of the said States or Territory, the person to whom such labor or service may be due, his agent or attorney, is hereby empowered to seize or arrest such fugitive from labor, and to take him or her before any judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city or town corporate, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such judge or magistrate, either by oral testimony or affidavit taken before and certified by a magistrate of any such State or Territory, that the person so seized or arrested, doth, under the laws of the State or Territory from which he or she fled, owe service or labor to the person claiming him or her, it shall be the duty of such judge or magistrate to give a certificate thereof to such claimant, his agent or attorney, which shall be sufficient warrant for removing the said fugitive from labor, to the State or Territory from which he or she fled.

Sec. 4. *And be it further enacted*, That any person who shall knowingly and willingly obstruct or hinder such claimant, his agent or attorney in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent or attorney when so arrested pursuant to the authority herein given or declared; or shall harbor or conceal such person after notice that he or she was a fugitive from labor, as aforesaid, shall, for either of the said offences, forfeit and pay the sum of five hundred dollars. Which penalty may be recovered by and for the benefit of such claimant, by action of debt, in any court proper to try the same; saving moreover to the person claiming such labor or service, his right of action for or on account of the said injuries or either of them.

JONATHAN TRUMBULL,
Speaker of the House of Representatives.

JOHN ADAMS,
Vice President of the United States, and President of the Senate.

Approved, February 12th, 1793.

GEORGE WASHINGTON,
President of the United States.

Act of Congress of 1850.

An Act to amend, and supplementary to, the Act entitled "An Act respecting Fugitives from Justice, and persons escaping from the service of their Masters," approved February 12, 1793.

Sec. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the persons who have been, or may hereafter be, appointed commissioners, in virtue of any act of Congress, by the Circuit Courts of the United States, and who, in consequence of such appointment, are authorized to exercise the powers that any justice of the peace, or other magistrate of any of the United States, may exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same under and by virtue of the thirty-third section of the act of the twenty-fourth of September seventeen hundred and eighty-nine, entitled "An Act to establish the judicial Courts of the United States," shall be, and are hereby authorized and required to exercise and discharge all the powers and duties conferred by this act.

Sec. 2. *And be it further enacted*, That the superior Court of each organized territory of the United States shall have the same power to appoint commissions to take acknowledgments of bail and affidavits, and to take depositions of witnesses in civil causes, which is now possesssed by the Circuit Court of the United States; and all commissioners who shall hereafter be appointed for such purposes by the superior Court of any organized Territory of the United States, shall possess all the powers and exercise all the duties, conferred by law upon the commissioners appointed by the Circuit Courts of the United States for similar purposes, and shall moreover exercise and discharge all the powers and duties conferred by this act.

Sec. 3. *And be it further enacted*, That the Circuit Courts of the United States, and the superior Courts of each organized Territory of the United States, shall from time to time enlarge the number of commissioners, with a view to afford reasonable facilities to reclaim fugitives from labor, and to the prompt discharge of the duties imposed by this act.

Sec. 4. *And be it further enacted*, That the commissioners above named shall have concurrent jurisdiction with the judges of the Circuit and District Courts of the United States, in their respective Circuits and districts within the several States, and the judges of the superior Courts of the Territories, severally and collectively, in term time and vacation; and shall grant certificates to such claimants, upon satisfactory proof being made, with authority to take and remove such fugitives from service or labor, under the restrictions herein contained, to the State or Territory from which such persons may have escaped or fled.

Sec. 5. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process, when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of such claimant, on the motion of such claimant, by the Circuit or District

Court for the district of such marshal; and after arrest of such fugitive, by such marshal or his deputy, or whilst at any time in his custody under the provisions of this act, should such fugitive escape, whether with or without the assent of such marshal or his deputy, such marshal shall be liable, on his official bond, to be prosecuted for the benefit of such claimant, for the full value of the service or labor of said fugitive in the State, Territory, or District whence he escaped: and the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently, in conformity with the requirements of the constitution of the United States and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or *posse comitatus* of the proper county, when necessary to insure a faithful observance of the clause of the constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose; and said warrants shall run, and be executed by said officers, anywhere in the State within which they are issued.

SEC. 6. *And be it further enacted*, That when a person held to service or labor in any State or Territory of the United States, has heretofore or shall hereafter escape into another State or Territory of the United States, the person or persons to whom such labor or service may be due, or his, her, or their agent or attorney, duly authorized, by power of attorney, in writing, acknowledged and certified under the seal of some legal officer or court of the State or Territory in which the same may be executed, may pursue and reclaim such fugitive person, either by procuring a warrant from some one of the courts, judges, or commissioners aforesaid, of the proper Circuit, District, or County, for the apprehension of such fugitive from service or labor, or by seizing and arresting such fugitive, where the same can be done without process, and by taking or causing such person to be taken, forthwith before such court, judge, or commissioner, whose duty it shall be to hear and determine the case of such claimant, in a summary manner; and upon satisfactory proof being made, by deposition or affidavit, in writing, to be taken and certified by such court, judge, or commissioner, or by other satisfactory testimony, duly taken and certified by some court, magistrate, justice of the peace, or other legal officer authorized to administer an oath and take depositions under the laws of the State or Territory from which such person owing service or labor may have escaped, with a certificate of such magistracy or other authority, as aforesaid, with the seal of the proper court or officer thereto attached, which seal shall be sufficient to establish the competency of the proof, and with proof, also by affidavit, of the identity of the person whose service or labor is claimed to be due as aforesaid, that the person so arrested does in fact owe service or labor to the person or persons claiming him or her, in the State or Territory from which such fugitive may have escaped as aforesaid, and that said person escaped, to make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which such service or labor was due, to the State or Territory in which he or she was arrested, with authority to such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary under the circumstances of the case, to take and remove such fugitive person back to the State or Territory whence he or she may have escaped as aforesaid. In no trial or hearing under this act

shall the testimony of such alleged fugitive be admitted in evidence; and the certificate in this and the first [fourth] section mentioned, shall be conclusive of the right of the person or persons in whose favor granted, to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.

SEC. 7. *And be it further enacted*, That any person who shall knowingly and willingly obstruct, hinder, or prevent such claimant, his agent or attorney, or any person or persons lawfully assisting him, her, or them, from arresting such fugitive from service or labor, either with or without process as aforesaid; or shall rescue, or attempt to rescue, such fugitive from service or labor, from the custody of such claimant, his or her agent or attorney, or other person or persons lawfully assisting as aforesaid, when so arrested, pursuant to the authority herein given and declared; or shall aid, abet, or assist such person so owing service or labor as aforesaid, directly or indirectly, to escape from such claimant, his agent or attorney, or other person or persons legally authorized as aforsaid; or shall harbor or conceal such fugitive, so as to prevent the discovery and arrest of such person, after notice or knowledge of the fact that such person was a fugitive from service or labor as aforesaid, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, by indictment and conviction before the District Court of the United States for the district in which such offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States; and shall moreover forfeit and pay, by way of civil damages to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive so lost as aforesaid, to be recovered by action of debt, in any of the District or Territorial Courts aforesaid, within whose jurisdiction the said offence may have been committed.

SEC. 8. *And be it further enacted*, That the marshals, their deputies, and the clerks of the said District and Territorial Courts, shall be paid, for their services, the like fees as may be allowed to them for similar services in other cases; and where such services are rendered exclusively in the arrest, custody, and delivery of the fugitive to the claimant, his or her agent or attorney, or where such supposed fugitive may be discharged out of custody for the want of sufficient proof as aforesaid, then such fees are to be paid in the whole by such claimant, his agent or attorney; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, upon the delivery of the said certificate to the claimant, his or her agent or attorney; or a fee of five dollars in cases where the proof shall not, in the opinion of such commissioner, warrant such certificate and delivery, inclusive of all services incident to such arrest and examination, to be paid, in either case, by the claimant, his or her agent or attorney. The person or persons authorised to execute the process to be issued by such commissioner for the arrest and detention of fugitives from service or labor as aforesaid, shall also be entitled to a fee of five dollars each, for each person he or they may arrest and take before any such commissioner as aforesaid, at the instance and request of such claimant, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them; such as attending at the examination, keeping the fugitive in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner; and, in general, for performing such other duties as may be required by such claimant, his or her attorney or agent, or commissioner in the premises, such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid by such claimants, their agents or

attorneys, whether such suppposed fugitives from service or labor be ordered to be delivered to such claimants by the final determination of such commissioners or not.

SEC. 9. *And be it further enacted*, That, upon affidavit made by the claimant of such fugitive, his agent or attorney, after such certificate has been issued, that he has reason to apprehend that such fugitive will be rescued by force from his or their possession before he can be taken beyond the limits of the State in which the arrest is made, it shall be the duty of the officer making the arrest to retain such fugitive in his custody, and to remove him to the State whence he fled, and there to deliver him to said claimant, his agent, or attorney. And to this end, the officer aforesaid is hereby authorized and required to employ so many persons as he may deem necessary to overcome such force, and to retain them in his service so long as circumstances may require. The said officer and his assistants, while so employed, to receive the same compensation, and to be allowed the same expenses, as are now allowed by law for the transportation of criminals, to be certified by the judge of the district within which the arrest is made, and paid out of the treasury of the United States.

SEC. 10. *And be it further enacted*, That when any person held to service or labor in any State or Territory, or in the District of Columbia, shall escape therefrom, the party to whom such service or labor shall be due, his, her, or their agent or attorney, may apply to any court of record therein, or judge thereof in vacation, and make satisfactory proof to such court, or judge in vacation, of the escape aforesaid, and that the person escaping owed service or labor to such party. Whereupon the court shall cause a record to be made of the matter so proved, and also a general description of the person so escaping, with such convenient certainty as may be; and a transcript of such record authenticated by the attestation of the clerk, and of the seal of the said court, being produced in any other State, Territory, or District in which the person so escaping may be found, and being exhibited to any judge, commissioner, or other officer authorised by the law of the United States to cause persons escaping from service or labor to be delivered up, shall be held and taken to be full and conclusive evidence of the fact of escape, and that the service or labor of the person escaping is due to the party in such record mentioned. And upon the production by the said party of other and further evidence if necessary, either oral or by affidavit, in addition to what is contained in the said record of the identity of the person escaping, he or she shall be delivered up to the claimant. And the said court, commissioner, judge, or other person authorised by this act to grant certificates to claimants of fugitives, shall, upon the production of the record and other evidences aforesaid, grant to such claimant a certificate of his right to take any such person identified and proved to be owing service or labor as aforesaid, which certificate shall authorize such claimant to seize or arrest and transport such person to the State or Territory from which he escaped: *Provided*, That nothing herein contained shall be construed as requiring the production of a transcript of such record as evidence as aforesaid. But in its absence, the claim shall be heard and determined upon other satisfactory proofs, competent in law.

HOWELL COBB,
Speaker of the House of Representatives.
WILLIAM R. KING,
President of the Senate, pro tempore.

Approved, September 18th, 1850.

MILLARD FILLMORE.

PART FIRST.

I. The Constitutional Provision — II. The Statute Provision — III. Review of Decisions.

"The DELIVERY of the PROPERTY itself — its prompt and immediate delivery — is plainly required, and was intended to be secured."—*Chief Justice Taney, in case Prigg v Com. of Pen.*, 16 *Peters*, 539.

"But the right to CONVEY is the NECESSARY CONSEQUENCE of a right to delivery. The latter would be good for nothing without the former." *Mr. Justice Wayne in the same case.*

The Act of Congress of September 18, 1850, relating to fugitives from service or labor, rests for its supposed authority upon a single clause in the Constitution of the United States. In the language of that clause, we, accordingly, have an absolute test for the validity of this Act. If it does not perform what the clause requires to be done; or if it does what that does not authorise; it is unconstitutional. Let us, therefore, compare the provision of the Constitution and the provision of the Act.

I. The Constitutional Provision. The portion of that instrument, which gives any authority to legislate upon this matter, is the third clause of the Second Section of the Fourth Article, in the following words:—

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up on claim of the party, to whom such service or labor may be due."

Raising no question for the present, as to who are the subjects of this clause, let us inquire what the Constitution directs shall be done with them. The words are not ambiguous. They are to "*be delivered up to the party, to whom such service or labor may be due.*"

1. There can be no doubt as to the place where this delivery is to be made. There must be an escape from one State into another,—a pursuit to the same State,—an arrest and claim there also; and when the claim has been established, there must be a delivery. It is not to be supposed that this last act has a different locality from those which precede it; that the examination and decision are to be in one State, and the execution or delivery in another State. Indeed, some respectable jurists have supposed that the whole obligation of this clause rested upon the State where the fugitive is found,* — an opinion, which would have no foundation whatever, if the delivery were not to be made within its own borders. The Acts of 1793 and of 1850 both follow this construction. Though the words of the latter are not consistent throughout, yet both statutes provide that the fugitive shall be placed in the hands of his master, immediately after the examination, and in the State where that is had.† The delivery of fugitives from justice

* This was Mr. Webster's original opinion. See Speech in the Senate, March 7th, 1850.

† See Act of 1793, Sect. 3, and Act of 1850, Sects. 4 and 6.

under the clause in the Constitution in juxtaposition with this, it may be observed, also takes place in the State where the fugitive is found; and if there be any analogy between these two clauses, it undoubtedly extends far enough to make the place of delivery the same under both.

2. This delivery completely restores the party to "whom such service is due" to his property in the fugitive's labor and his control over his person.

The word "deliver" has its peculiar legal force. It is an ancient word and of wide signification, coming down to us from the early days of Feudalism, and applying equally to real estate, to personal chattels and incorporeal hereditaments; and it has now the same signification, it had then, denoting the surrender by one and the entry of another into a right, the closing, not the commencing of a bargain. It was long regarded as the most notorious evidence of property in land; and it still has power to fix and determine the rights of parties. It is the delivery which completes the contract and transfers the possession from the seller to the buyer in case of sale. It has the same meaning in martial history. The defeated commander *delivers* to his victorious enemy, the citadel or fortress, or symbolically for the whole city, the keys of its gates.

Used, as it is, in the Constitution without qualification, it cannot denote any restricted or imperfect right on the part of the master. So full, in fact, is the right secured to the master by this clause of the Constitution, that the Courts have held that he may, even without legislation, anywhere, lay strong hands upon his fugitive servant, and by force carry him away. The Supreme Court of Massachusetts have so decided.* The Supreme Court of New York have taken the same view; and afterwards the Court of Errors

* 2 Pickering's Reports, 11.

for that State in the same case confirmed this ruling.* The Supreme Court of the United States say, "We have not the slightest hesitation in holding, that, under and in virtue of the Constitution, the owner of a slave is clothed with entire authority in every State in the Union, to seize and recapture his slave, whenever he can do it without any breach of the peace, or any illegal violence."†

Indeed, this right of recaption is the first fact that meets us in the discussion of this subject; and it is a very significant fact. He may take his escaped servant, not by virtue of any official character, with which he is clothed, *but as his own, in his own right;* according to the Constitution, as he would take his minor child, and according to the common construction of the Constitution, as he would take his stray horse. The simple fact, that he thus takes him *as his own*, without process of law, leaves no ground for argument, that his right is restricted and special. It not unfrequently happens, that the master, having arrested the fugitive slave, proceeds to sell him to individuals anxious to procure his freedom; and recently, if we may rely upon newspaper reports, the Supreme Court of Ohio have decided that such a sale is valid, although the laws of that State recognise no such property; yet, say the Court, the right to sell arises from the right of recaption, most clearly regarding the right of the master as unqualified. Whether there has been such a decision or not, is of little consequence in this connection, as probably no one doubts the right of the master to sell; and if he have power to sell, then his constitutional right cannot be limited and special. It must be perfect and absolute.

The Courts have, accordingly, held the right of the master

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* Jack *v* Martin, 12 Wendell, 311 (321), and 14 Wendell, 507 (527).

† Prig *v* The Com. of Penn., 16 Peters, 539, (613).

to be absolute and complete, not conditional and limited. The Supreme Court of New York say, "the owner has not only an *un*qualified right to the possession, but he has the guaranty of the Constitution in respect to it."* The Supreme Court of the United States, in the case before quoted, express the same conclusion in still stronger language; for they say, "The clause manifestly contemplates the existence of a positive, unqualified right on the part of the owner of the slave, which no State law or regulation can in any way qualify, regulate, control or restrain;" and again, "the object of this clause was to secure to the citizens of the slaveholding States the *complete right and title of ownership in their slaves as property*, in every State in the Union, into which they might escape, from the State where they were held in servitude;" and they also speak of the right of the master, as a *positive right, independent of comity* and *confined to no territorial limits*, and bounded by no State regulations or policy," as a right "*to the immediate possession of the slave and the immediate command of his service or labor;*" and as if to put the matter beyond dispute, they declare, that, "the clause puts the right to the service or labor *upon the same ground and to the same extent* in every other State, as in the State from which the slave escaped, and in which he was held to service or labor."†

By thus interpreting this clause of the Constitution, by following the word "delivered" in its full force, instead of attempting to substitute for it the force of some other words, the Supreme Court have, perhaps, avoided difficulties, not otherwise to be escaped. If, instead of giving to the master an absolute delivery, his right be restricted to a mere removal of his servant or slave to the State whence he escaped, we shall find:

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* Jack *v* Martin, 12 Wendell, 311 (321).

† Prigg *v* The Com. of Penn., 16 Peters, 539.

First, That as soon as the master with the reclaimed fugitive in his possession, under a certificate that he is his servant, or as the Courts say, his property, shall turn aside from the route to the State whence he fled, the certificate ceases to secure any right to the master, and the slave becomes free. The destination of the master with the reclaimed fugitive may be inquired into in every State through which he passes. It is not enough that he has from the lawful tribunal a judgement that the person in his custody, is his servant, or his slave, his property guarantied to him by the Constitution. He must give an account of himself. He must answer the question, "Where are you going with this property of yours?"

If the slave escaped from Georgia, and the master attempts to carry him to Missouri, the slave may, in the Courts of Indiana or Illinois, bring an action for assault against his master for attempting to carry him thither; and the Courts must sustain it, and declare the slave free; for the right of the master under the certificate is limited, and he has overstepped its bounds. He may, even in the State where he has been arrested and decided to be a slave, bring this action, and the direction of the master's route, towards Georgia or Missouri, will be a question of fact for the jury to find.

Secondly, If the escape was from Georgia, and the slave be found in Illinois, and the master has since removed to Missouri; he cannot claim the right to remove the slave across the Mississippi to his new domicil in Missouri; but must carry him back to Georgia.

These and similar difficulties the Supreme Court seem to have avoided, by adhering to the obvious intent of the clause. They started from the Constitution, which was their true point of departure: and in discussing the same matter, we must follow their construction and their example.

If the nature and effect of the proceedings in the case of a fugitive from labor, is in question before us, we must look to the same source of authority for instruction. If the trial in a case of successful claim between the claimant and the alleged fugitive terminate in the issuing of a certificate, we must, from the clause, gather what would be the nature of the fact certified, in a document of this sort answering the requirements of the Constitution; and see what consequences that fact legally involves. This must be the ultimate guide, in determining the authority and power of the master; for Congress cannot confer upon him a right different from that which the Constitution declares, shall be secured to him. The Acts of Congress must provide for him the remedy pointed out in the Constitution,— the same remedy, — nothing more, and nothing less. The legal character of the fugitive before the Court must correspond to the description in the Constitution, and the decision of the tribunal, in order to sustain the claim, must set forth that the claimant and captive mutually sustain the relation named therein; nor can the Courts or the statute, after this relation is proved, limit its legal force. They cannot require a man to establish by process of judicial investigation a certain right, and then refuse to allow him the full legal scope of that right. The law knows no such *nihil sequitur* as this.

What, then, is the fact to be stated in the certificate, and what is its legal force? The fact which the Constitution requires to be certified, is, that the fugitive owes service or labor to the claimant in a certain State. Now the force,— the first force,— of this fact must be, that within that State, the master has a right, under the laws thereof, to exact this service or labor at the fugitive's hands.

Secondly, it follows as a legal consequence, that the fugitive must become a slave not only within that particular State, but also in every other State which allows the sys-

tem.* For the characteristics of a slave are the same in all of the slave States. If a man is a slave in Georgia, he is, by the law of slavery, a slave in each of the other fourteen slave States.

The certificate must set forth this fact, legally implying these consequences, in order to authorise a delivery of the fugitive into the hands of his master. Undoubtedly, this delivery carries with it the right of removal to the State where the fugitive is held to service or labor. It would seem also, that the right of removal would follow the consequential right to exact service in every State whose laws are similar, as well as the immediate right to do so in the State where he was held. It does not seem reasonable, that, after the delivery of a slave to his master in Illinois, the latter shall be hindered from carrying him into the adjoining State of Missouri, simply, because he originally escaped from Georgia. This limitation seems arbitrary, and to have no foundation in the nature of the case. It is true, that, if the master takes the fugitive to a free State and there remains, the laws of that State will treat him as free. But it does not necessarily follow from this, that the master may not carry the slave who has been delivered to him, through that State, on his way to a slave State, even though it be other than the State from which he escaped. It is plain, at least, that, if he with the reclaimed slave finds himself in a State which recognises the relation, he may there exercise all the power of a slaveholder; and the certi-

* That is, if "held to service or labor," and being a slave, are in law one and the same thing. If they are not legally alike (and Commissioner Curtis has denied their identity), then the Constitution does not require the delivery of fugitives from slavery at all.—See trial of Thomas Sims, 28.

The distinction between property in service or labor; and property in a person who is said to owe service or labor, (if a person owned can owe), is not essential to the main purpose of this argument. In some places in the text it is retained, and in others allowed to disappear.

ficate, so far from restricting, will be conclusive confirmation of his ownership; for the essential facts which constitute a man a slave in any slave State, are judicially recognised in every other slave State, without any inquiry as to where he was first reduced to that condition. It is enough that he be born of a slave mother — the Georgia Courts will not recognise any difference in the locality,—whether it was in Georgia, or Virginia. It is also enough that the fugitive himself be actually a slave in any slave State; and this is the fact which appears in the certificate.

The language of Judge Story, speaking for the Court in the great, leading case upon this subject, comes fully up to the support of this statement. He says:—

"We have said that the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any State law or regulation whatsoever, *because there is no qualification or restriction of it to be found therein; and we have no right to insert any which is not expressed, and cannot be fairly implied; especially are we estopped from so doing, when the clause puts the right to the service or labor upon the same ground and to the same extent in every other State as in the State from which the slave escaped, and in which he was held to service or labor. If this be so, then all the incidents to that right attach also; the owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own State confer upon him as property; and we all know that this right of seizure and recaption is universally acknowledged in all the slaveholding States.*"*

There is no restriction of the master's right in the constitutional clause which provides for the delivery of the fugitive servant into his hands. There is no restriction; and the Supreme Court of the United States will not venture to insert any; of course, then, inferior tribunals can insert none. A successful claim must result in the establishment, in the State where the fugitive is found, in the presence of the tribunal before which he is brought for an adjudication of his rights and liabilities, and by virtue of its decision, of the

* 16 Peters, 613.

relation, between the claimant and the claimed, of slaveholder and slave, as under the laws of the State where he was held in slavery,—in an actual entrance into this relation by a delivery of the slave to his master.

It is true that this relation will not be permanently allowed in a free State; but the tribunal has no right to insert this statement in its decision. The same would take place in England; but what has English law to do with the case? The case is not to be tried by English law, or Massachusetts law, or by the law of any State or country which deems all men free. How can a slave case be decided, or the force of a certificate that a person is a slave, be measured by the law of universal freedom? In weighing the decision in the case of a fugitive from slavery, the question is, not what respect Massachusetts or any other free State, when their system of laws operates upon it with full force, will pay to it; but, what is its force under the Constitution of the United States, which is said to recognise slavery; and, of course, then, we must only ask, what will be its force in a slave State. How will it be interpreted in Georgia, Alabama or any other State which permits men to be held as chattels? In a State of this latter character, there can be no doubt, that it will be allowed the same validity as in the State with reference to whose laws it was given.

Precisely here, a distinction has been raised, between the force of the certificate and the force of the laws of the State under which the certified fugitive becomes a slave. It may be thought that the inability of the master permanently to hold the slave in a free State, arises from a limitation in the certificate; while it is said that the ability of the master to hold a slave in a slave State arises, not from the certificate, but from the laws of that State. This is to invert this distinction. Undoubtedly, this power resides in the State laws; but that does not lighten the weight of the certificate.

When, after capital trial and sentence of death, the condemned is hung, it is not the judgment of the Court that puts him to death; it is the law. If it be otherwise, then a very common and current rhyme is at fault, and there is no truth in the old couplet,

> "No rogue e'er felt the halter draw
> With good opinion of the *law*."

But what makes him subject to the law's grasp? What brings him within its penalty? It is the solemn sentence of the Judge. So likewise, for the fugitive, the slave code sleeps, till the certificate secures him as its victim. This paper points out the subject of that code. This is the copula that fastens that system upon this man; and only as such a copula does any judgement act. Accordingly, a certificate of the fact of slavery, ceases to make a man a slave in England, or permanently in a free State, not because it has lost its connecting power; but because there is no law of slavery which it can connect with the person certified. But in a slave State, retaining only the same copulative strength, it finds a system of law which it brings to bear upon the man, and thereby fixes his condition as a slave. In other words, and to make the legal distinction clearer, the certificate, nowhere, in the Union, at least, ceases to be evidence of the fact certified; but in some States and under some circumstances, the fact certified, even when conclusively proved, ceases to be of any avail to the master.

From this it at once follows, that, under the construction of the Constitution which has been laid down by the Supreme Court, the master having taken a delivery of his slave, may, by the force of that delivery, carry him through the slave States, any where, even to Cuba or Brazil; and the clause under which he is delivered, contains no limitation of his power, and of course, then the tribunal who adjudicates the case, can take knowledge of none.

Moreover, there are circumstances, which indicate that he has the same power of free passage with his reclaimed slave, through a line of free States. It is to be noticed that, in the extract above, Judge Story declares, that the clause places the master's right upon the same ground and to the same extent in every other State, as in the State whence he escaped; and that the master has a right of recaption, precisely as under the local laws of his own State. He lays down the principle, that the right of the master in the free State is the same as in a slave State. This is the rule covering the point in discussion; and the particular fact used in illustration, is worth examination of itself; for the master must have the same right by legal process that he would have by recaption.

If the master proceed to recapture, can the State step in between him and his slave, and inquire into which of the other thirty members of the Union he means to carry his recaptured property? Can a slave State do this? If a slave State may not, can a free State make this inquiry? If so, then the rights of a master over a fugitive slave are essentially different in different States of the Union, and the equal right, which it is said the Constitution meant to secure for him, does not exist. What is the value of the right of recaption, if, after it has been effected, the Courts of the State where it was achieved and the Courts of every State through which he passes, may, in turn, compel the master to come into its presence, and show that he means to carry, and is conveying the fugitive back to the State whence he fled. Is it not a more reasonable, more logical and more constitutional method of interpretation, to say that the master's right is absolute, and that its only limitation, is that he may not permanently hold a slave in a State whose laws do not allow the system of slavery; and consequently has a

right to carry him anywhere, taking his own risk as to the validity of his title when he has reached his domicil?

But this extent of the right of removal, or of the right to exact service, is not essential to the argument. Suppose that there was but a single slaveholding State; and, consequently, the ownership of the master and his right to remove, were confined to Georgia alone, for instance. This would not make the delivery any the less absolute. His slaves in Georgia are as absolutely his as his real estate which cannot be severed from its territory. That they may cease to be his slaves when he takes them into another State whose laws make them free, does not affect the legal nature of his title under Georgia's laws; and it is the laws of Georgia, according to which the issue between the claimant and the alleged fugitive is to be determined. It is Georgia's laws, the extension of which in this particular class of cases, over all the Union, the Constitution intended to secure. So the Courts have declared. They have defined the right of the master under the third clause of the Second Section and Fourth Article of the Constitution; and their definition does not seem ambiguous or equivocal. If there be any meaning in their words; if there be any force in this language of the highest judicial tribunals of our country; it is this, that the master's possession and property in his reclaimed servant or slave, in the State whither he has fled and where he has been taken, is, under the Constitution, perfect, and needs no further act on his part and no further judicial proceedings to complete it. "The delivery of the property itself," in the words of Chief Justice Taney—"its prompt and immediate delivery—is plainly required, and was intended to be secured." A delivery of property—as property—to its owner—absolutely and without restriction, is what the Constitution requires.

II. The Statute Provision. Let us now examine the Act of Congress of 1850, "to amend and supplementary to the Act entitled an "Act respecting fugitives from justice and persons escaping from the service of their masters, approved February 12, 1793," in order, first to ascertain whether it secures to the master the unqualified right, which the Supreme Court have decided, was intended to be secured by the clause of the Constitution relating to this subject. Does it, without qualification and without restriction deliver to the master his fugitive servant?

The 4th Section provides, that the tribunals to whose jurisdiction the matter is, by this Act, committed,

"Shall grant certificates to such claimants, upon satisfactory proof being made, with authority *to take* and *remove* such fugitives from service or labor, under the restrictions herein contained, *to the State or Territory from which such persons may have escaped or fled.*"

The 6th Section provides that the Court, Judge or Commissioner, before whom the fugitive shall be brought, shall upon satisfactory proof,

"Make out and deliver to such claimant, his or her agent or attorney, a certificate setting forth the substantial facts as to the service or labor due from such fugitive to the claimant, and of his or her escape from the State or Territory in which such service or labor was due, to the State or Territory in which he or she was arrested, with authority to such claimant, or his or her agent or attorney, to use such reasonable force and restraint as may be necessary under the circumstances of the case, *to take and remove* such fugitive person *back to the State or Territory from whence he or she may have escaped as aforesaid.*"

If these words express the principal and sole right secured to the master by the statute; if a more important right than is expressed, is not implied in their meaning; it will be seen at once, that these sections make no provision for an unqualified delivery of the servant to his master. They confer only a mere right of removal to a particular State; and so they have been construed by the officers who have had to discharge the duties prescribed by this Act. In the

case of Thomas Sims, who was, in April of the present year, sent back from Massachusetts to Georgia, under this Act, George T. Curtis, Esq., the Commissioner who issued the certificate, used the following language:—

"It would seem, therefore, that it only remains to inquire whether the Act of 1850 authorises or requires anything more than a summary ministerial proceeding, in aid of the right secured by the Constitution, namely *the right of removal*. The statute, like the Act of 1793, requires the claimant to present to the Commissioner proof that the person whom he demands, owes him service in another State; and when the Commissioner is satisfied of this, he is to grant a certificate which will authorise *the removal*" "The force and effect of the evidence required by the statute, must be limited to the object for which it is required; and if that object be, as it clearly is, to establish the *right of removal only*, it cannot be extended to another and ulterior object, namely the right to continue to hold the party after he has been removed."

Again, he speaks of the proceedings as "clearly designed to be ministerial and to secure only the *limited right of removal*." And in another place, "Entertaining therefore a very clear opinion that these proceedings are ministerial, and that it is perfectly competent to Congress to authorise a magistrate, appointed by the authority of Congress, who is not a judge, to make this judicial inquiry for this *special and limited purpose*," that is, of *removal*.

In the trial of James Scott, indicted for aiding in the rescue of Shadrach *alias* Frederick Minkins, a person held under the provisions of the Act of 1850, Judge Sprague, in his charge to the jury, sustained the opinion of Commissioner Curtis:—

"The certificate, of itself, gives no authority whatever to treat the party as a slave. It is merely a warrant to remove him to a certain place." "The certificate is simply an authority for transportation, nothing more." "It is merely an authority to carry the person named from one State to another."

These extracts from the opinions of Judge Sprague and Commissioner Curtis, so far as they are correct, and the previous extracts from the Act itself, so far as they are substan-

tial provisions affecting the purpose of the statute, leave us in no doubt as to the right secured to the master of a fugitive from service under its sections. It is only the right of removal. It is a right special and limited — confined to a certain line of travel. Simply a transportation from one State to another. It does not secure to the master the immediate possession of the slave and the immediate command of his service, which he would have by recapture — "the positive, unqualified right" — "the complete right and title of ownership in his slaves as property, in every State in the Union into which they might escape, from the State where they were held to servitude"—"a right confined to no territorial limits," which, the Supreme Court have declared, was intended to be secured by the adoption of the clause in the Constitution, in relation to fugitives from service. It does not, like that clause, "put the right to the service or labor upon the same ground and to the same extent in every other State as in the State from which he escaped, and in which he was held to service or labor." It does not secure the delivery of the servant to his master as his own, in his own right, which the Constitution had guarantied to him; but substitutes in its stead, the right of removal which the Constitution has never conferred. It is an Act of Congress, which is liable to the full force of the objection, which Judge Story urged against the probable provisions of local legislation, as a reason for considering the jurisdiction over this subject to be vested in the national, and not in the State legislatures, "leaving the owner, at best, not that right which the Constitution designed to secure — a specific delivery and repossession of the slave."* It does not perform what the clause under which it has passed requires; and it does what that clause does not authorise. It utterly fails to fulfil what

* 16 Peters, 614.

has without stint or forbearance, been urged upon us as citizens, as a great constitutional duty, to wit: the *delivery* of fugitive servants to their masters. In its stead it imposes an unconstitutional usurpation. It is, therefore, an unconstitutional statute.

This view will be confirmed by reading the 9th Section of this Act, where the failure of the statute to provide for a constitutional delivery in the State where the fugitive is found, shows itself in the adoption of another unconstitutional provision. According to that Section, in case of an apprehended rescue, the Federal officer making the arrest, must convey the fugitive to the State whence he fled, and be paid therefor from the United States Treasury. This provision has no sanction, but a plain condemnation, even if there were a complete analogy between the delivery of fugitives of the two classes — from justice and from service; for by the Act of 1793, the State demanding is required to convey the fugitive from justice to its own jurisdiction, and to pay all the costs of the apprehending, securing and transmitting. Here, in this Section, we have at last, what Roger Sherman, in the Constitutional Convention, declared ought not to be provided for by that instrument; and what is of weight with us, what the Convention framed the Constitution, purposely so as to avoid — the carrying back of fugitives from service at the public expense.

Furthermore, this provision is incongruous with the idea of service, and more so with that of slavery. Few can have failed to notice, in the case of Thomas Sims before alluded to, that the method of his conveyance little suited the character in which he was transported. He was carried away as a prisoner of State; a great chieftain captured in war; a hero at last overcome. The idea of degradation and servitude is put to flight by the dignity which invests the captive. A few more such renditions as this, and

slavery will be abolished, is the thought of earnest Abolitionists. The citizens of Savannah, on the other side, perceiving the incongruity, speak bitterly of the return from Boston, of the "African lion;" and complain that the "pomp and circumstance" of his taking and bringing back had spoiled the negro. Undoubtedly, much of the intense interest which attached to Sims, was owing to the humane sympathy manifested for him by the friends of freedom, and their efforts for his protection. At least, they accomplished this: they elevated the character in which Sims stood before the country, from that of an escaped slave, to that of a man in whose wrong, the whole body politic received a wound. But the fact now to be noticed, is that the letter of the statute lent them aid, by sending him back in the custody of the officers of the law, instead of delivering him into the hands of his master; and so far it is unconstitutional. There is but a single method of constitutionally conveying a reclaimed servant from one State to another. He is to be delivered up to the party to whom his service or labor is due; and then, if that party shall see fit to transport him elsewhere, let him do so under his own control, at his own expense; and let him have from the government whatever escort is necessary to protect him in the quiet possession of his servant, nothing more. The Constitution requires a delivery, which may be followed by an escort: the unconstitutional statute refusing or delaying to deliver, provides a conveyance.

Will any one say, that a delivery of the person, and the granting of a certificate which merely authorises a removal from one State to another, are legally one and the same thing? If so, "Under which king Bezonian?" Is the unqualified right a qualified one? or is the qualified an unqualified right? and which shall fix the character of the

previous proceedings, the limited right of removal or its equivalent, an absolute delivery? But, seriously, the difference is too broad to need demonstration. It is recognised by Mr. Justice Wayne, in the passage, placed at the head of this portion of this argument; and the view adopted by him is followed in these pages, viz: that the right of removal necessarily flows from the delivery; that they are different, the one greater and the other less and included in it; and so cannot be substituted, the one for the other. According to him, both are incidental rights arising from the right of property: the one expressly guarantied in the Constitution as the master's remedy, the other by necessary implication arising therefrom. He says, "But the right to convey is the necessary consequence of a right to delivery. The latter would be good for nothing without the former." But the Act of 1850, as it has been construed, does not give the delivery and the right of removal as its necessary incident; it attempts, at best, to substitute the latter for the former, as though the latter, not the former, were the right guarantied by the Constitution.

Not only is the statute so construed as to attempt to deprive the master of the delivery, which under the Constitution he has the right to claim; but even the removal which is allowed to him, is not, if the language of the tribunals be understood in its most obvious sense, such a removal as that instrument implies; but altogether a different affair. According to the interpretations of the Act of 1850, this removal is a ministerial act, like the removal of a fugitive from justice, for the special and limited purpose of further judicial proceedings; and the master or other person removing, acts, as it were, in an official character. But, according to the Supreme Court, the master has a right to remove, as owner; because he has property in the person to be removed; and the purpose of the removal is not special and

ministerial, but private and unrestricted; simply that he may have the free use and enjoyment of his property, that he may receive the service due from his servant.

III. Review of Decisions. It is not a correct, nor if it were correct, would it be a sufficient answer to this argument, to say that the Act of 1793 was liable to the same objection; and that the Supreme Court of the United States, and the Supreme Courts of several States have decided that "to be clearly constitutional in all its leading provisions;" and hence, the Act of 1850 must also be faultless in this respect. In general, it is not correct, because the question of the constitutionality of its leading provisions, as the statement following will show, was never raised in a case awaiting their decision; and they have never examined or professed judicially to examine its particular provisions; and, therefore, it is impossible for them to have decided that they were all clearly constitutional. In particular, it is not correct, because the Court was never called upon to set aside the Act of 1793, on the ground that it did not secure to the master the right guarantied to him by the Constitution. Besides, it is insufficient, because subsequent decisions have sustained the constitutionality of the principal provisions of the Act of 1793, only by assigning to it a different purpose and object from that presumed in the reasoning of that tribunal; and the Court could not adhere to such a decision, after it is shown that the statute secures to the master a right, altogether different from that, which, they have deliberately decided, was the intent of the Constitution.

The clause of the Constitution relating to fugitives from labor, was for the first time, brought before the Supreme Court of the United States, for adjudication, in 1842, in the case before alluded to.* The facts of that case, pertinent to

* Prigg *v* the Commonwealth of Pennsylvania.

the present discussion, were substantially as follows: That Commonwealth, as the result of an amicable conference with Maryland, the adjoining slave State, had passed a statute prescribing the manner in which a person, to whom service or labor was due in another State, should proceed in reclaiming the person who had escaped from such service into the State of Pennsylvania. Prigg had seized and removed a person held as a slave in Maryland, found in Pennsylvania, without complying with the provisions of Pennsylvania's statute, and was accordingly indicted for a violation of her statute against kidnapping. The constitutionality of the Pennsylvania statute was the question directly before the Court. In determining this, however, they endeavored to ascertain the nature of the right which the Constitution intended to secure to masters of persons escaping from service; and then, from this as a starting point, to determine:

1. Whether the power to legislate under that clause was vested in the national or State legislatures;

2. Whether Congress, if the power was vested in that body, held it exclusively.

Their first step was to interpret the clause of the Constitution; to define the right therein secured to the master. This was the Alpha of the whole matter; and they could not go forward at all, towards a sound conclusion, without first fixing the meaning of the constitutional clause under which the question before them arose.

Accordingly, they proceeded to fix the meaning of that clause, and to define the right which it intended to secure to the master of a fugitive from service. They deliberately and unanimously declared, that the object of this clause was to secure to the slaveholder "the complete right and title of ownership in his slaves as property in every State in the Union into which they might escape." He had guarantied

to him by the Constitution, the right to an unqualified delivery of his property, wherever it was found. His right was the right of property; "the complete right and title of ownership;" "the right of the owner to the immediate possession of the slave and the immediate command of his service and labor;" a right so unlimited, that, wherever he may find the slave, he may seize him, and carry him away as a piece of his property.

The next case that brought this clause before the Court, and the last, unless another was argued at their last session, was the case of Jones *v* Van Zandt.* Here, again, the slaveholder's right of property was recognized and reasserted; and his right to pursue and retake, fully acknowledged. It cannot be said that this construction of the constitutional clause, in these two cases, is an *obiter dictum*. There were *obiter dicta* enough in the Prigg case, as those who have endeavored to construe the principles of its decision most favorably to the slaveholder, have more than once found occasion to remark. But this definition of the slaveholder's right was not among them. This must be considered as settled by their authority; and even without their authority, it is submitted that no other interpretation could be supported.

There is, however, another portion of their decision in the Prigg case, which must not be passed over in this connection. In determining that the power to legislate under this clause existed in Congress, Judge Story, giving the opinion of the Court, brought forward as the last reason in support of that opinion, the passage by Congress of the statute of 1793, as an instance of contemporary construction, and adduced the decisions of several State Courts in favor of its validity; and then, he may be said to have concluded his

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* 5 Howard, 217.

reasoning upon the power of Congress to legislate, by declaring, that, without resting upon prior decisions of State Courts, but *sua sententia*, "We hold the Act (of 1793) to be clearly constitutional in all its leading provisions, and, indeed, with the exception of that part, which confers authority upon State magistrates to be free from reasonable doubt and difficulty, upon the grounds already stated." In the Van Zandt case, the constitutionality of the provisions of the Act of 1793 was considered as settled by the Court in the Prigg case, and was not therefore examined. This decision is what in Greek would be called an *enclitic*, leaning upon something that precedes it, and of course adding no weight of authority to the previous decision, upon which alone we must rest.

It must be recollected, that, in the Prigg case, the question of the constitutionality of the provisions of the Act of 1793, was not before the Court; that the counsel for the defendant in error did not raise and press upon their consideration, any objection to any of its provisions; that the question they had to determine, did not depend upon their validity; that the counsel for the plaintiff in error, did not even allude to any of the features of the Act of 1793, which are now the subjects of contention in connection with the Act of 1850, and only, in the most general manner, assumed the constitutionality of that Act; that the Act of 1793 was brought forward as an element in the discussion, simply for the purpose of showing that Congress had power to legislate under this clause; that the only objection to its constitutionality, stated by Judge Story and considered, was the objection, that the power of legislation was not in Congress; that this was not one of the questions which the Court proposed to itself to settle, in order to determine the case; nor did they have to decide this, in order to reach the answer to any of those questions; for, the conclusions previously reached by

the Court, that this clause vested legislative power in Congress alone, rendered it unnecessary for them to inquire, whether the statute of Pennsylvania conflicted with the Act of Congress, and then, whether the latter was constitutional in its provisions, as they thereby determined the former unconstitutional *ab initio*, from want of power in the State legislature to enact it; but on the contrary, after they had reached the conclusion that Congress had the power to legislate upon this matter, they went on, without legal or logical necessity, to remark that this Act of Congressional legislation was, in their view, in perfect accordance with the Constitution. It is also worthy of notice, that, when Mr. Justice Wayne came to re-state in a formal manner the decision of the majority of the Court, in order that he might give his own reasons for concurring, he did not include the opinion, that the Act of 1793 was constitutional, because he did not understand that any such had been expressed, for he deliberately attempted to repeat, point after point, all that they had decided; and that Mr. Justice Daniel spoke of the Act of 1793, "so far as it conforms to the Constitution," most plainly implying that the extent of its conformity with that instrument had not been determined. Now in the face of these facts, it seems clear, that, if there was an *obiter dictum* in this case, this was one. If in the report of this case, there is any opinion which may be considered as uttered without the deliberate sanction of that tribunal, it is this, that the Act of 1793 was, in all its leading provisions, clearly constitutional.

But, giving to this expression of the Court even more weight than properly belongs to it, and considering all the decisions of State Courts in favor of the constitutionality of summary, ministerial proceedings in the case of an alleged fugitive from service, let us follow further down the current of decisions in relation to this matter. The Supreme Court

fixed as their starting point, the doctrine that the Constitution secured to the owner the *unqualified right of property* in the fugitive, in the State where he was found, and guarantied to him his *unqualified delivery*. But, upon able argument against the Act of 1850, which requires only such summary proceedings, and an earnest pressing of objections against particular provisions of this Act, in the hearing of Commissioner Curtis, it is found that this summary proceeding can only be sustained by ruling that the Act merely secures to the master *the limited right of removal*. Judge Sprague, upon a deliberate examination of the matter, confirmed this view of Commissioner Curtis; and if I mistake not, other tribunals have been compelled to resort to the same reasoning, in order to justify the absence of both judge and jury in the determination of the question, which arises between a claimant and an alleged fugitive from service.— Thus ruling, they have gone counter to the solemn decisions of the Supreme Court of the United States, and of all other tribunals, in regard to the right secured to the master by the Constitution. They have even overruled their own reasoning in the very cases where they have advanced this opinion; for they habitually recognise the right of recaption, and if that exists, the master's right is unlimited. They construe the Act of 1850 to provide a remedy entirely different from that, which the Supreme Court had in mind, when they alluded to the Act of 1793; and then attempt to make those allusions conclusive authority in favor of the Act of 1850, under their opposite interpretation. In order to escape the force of arguments against the constitutionality of the Act of 1850, based upon individual features of that Act, they have ruled it to be unconstitutional in its whole scope and object.

There is even a more striking contradiction than this, in

the decisions of the Courts in relation to this subject. Two opinions, diametrically opposite, are stated by different tribunals in the same case, and yet, both enforced as correct constructions of the same document; the opinion of the higher tribunal; adopting, without hesitation, the interpretation of the Constitution advocated in these pages; and the contradiction showing, that the decisions of the Courts upon this subject, are not clear and harmonious; but careless, confused and palpably in conflict with each other.

I refer to the case of Thomas Sims. In the Boston Courier of April 19, 1850, it is stated that Sims was brought before Judge Woodbury of the Circuit Court, upon a writ of *habeas corpus*, to allow an examination into the sufficiency of a criminal warrant issued against him, and the delay of the Marshal in not having him examined upon said warrant. In the hearing the next day,

"Mr. Sewall, as counsel for Sims, moved the Court to appoint a person to serve a writ *de homine replegiando*, issuing against the Marshal, for Sims, and urged it as requiring immediate attention.

Judge Woodbury advised delay till the writ of *habeas corpus* was disposed of.

Seth Thomas, Esq. then objected to Mr. Sewall's acting, in this new case, as counsel for the prisoner; the Commissioner having decided this forenoon, that Sims was a slave, and having given a certificate and order to send him to Georgia whence he escaped, he was now under the control and advice of his master and agent, for whom Thomas, and not Sewall, was counsel.

The Marshal then *read an additional return setting out this certificate and decision* of the Commissioner to-day.

Judge Woodbury said, that these papers must decide the point, that Mr. Thomas now had the better right to appear in behalf of the *master and Sims* unless Mr. Sewall objected to the constitutionality of the laws under which the Commissioner had acted. If he did, an opportunity would be given to be heard on that point, and it would then be decided.

Mr. Sewall did not wish to go into that argument, now, on this motion; and the Judge then said, the laws must be presumed constitutional till the contrary was shown and adjudged, and consequently *Mr. Thomas had now a right to act on this motion as to the writ de homine, rather than Mr. Sewall.*"

It will be recollected that Commissioner Curtis, in issuing the certificate, had emphatically insisted, that it conferred on the master only the *limited right of removal;* and Judge Sprague, afterwards, following the same opinion, declared, "*The certificate, of itself, gives no authority whatever to treat the party as a slave.*" Yet, when the certificate is read before a Justice of the Supreme Court of the United States, and he is asked to interpret its force, he decides, that it at once establishes between the claimant and the fugitive, the relation of slaveholder and slave, "to the fullest extent;" the limitations he immediately afterwards mentioned, being such only as he supposed to be recognised by the laws of slave States. The fact set forth in the certificate was powerful enough to merge the legal being of Sims in that of his master, to leave him no personality whereby he could even appear in Court, and ask for a process to cause a re-examination into the correctness of the certificate. It put into actual operation on the soil of Massachusetts, the worst principle of the slave code, which in some States is declared to deem the slave *pro nullis, pro mortuis.* Then, to justify this opinion, he further said, "when slaves escape to such States as Massachusetts, from other States still allowing the institution, they are *still slaves,* both by the Constitution and the acts of Congress;" not persons whom some other persons have the limited right of removing into another State, but *slaves,* by the *Constitution* and the acts of Congress.

Hastily as it may have been given, this opinion, completely refuting all that Commissioner Curtis had said about the limited force of the certificate, is too emphatic and decided to be disregarded. How shall we explain this striking discrepancy between the Judge of the District Court and the Commissioner on the one side, and the Judge of the Circuit Court on the other? It is only an instance of the confusion

of the Courts in this matter, tokens of which are elsewhere apparent: a specimen of two entirely different sets of rulings, which may now be discovered, and which apparently promise long to continue their irreconcilable opposition; one set being founded upon the provisions of the Constitution, and the other upon the unconstitutional provision or construction of the Statute. To the first class belongs this opinion of Judge Woodbury's, being based upon the Constitution, at least, so far as it differed from the opinion of Curtis and Sprague, in regard to the force of the certificate. His attention had not been directed to the words of the statute, and they were not in his mind. He knew, however, or rather thought (for a more familiar acquaintance with the practice under the Act of 1850, would, probably, have convinced him of his error in this respect) that a man could not legally be taken as a slave, until it was proved that he was a slave; and this fact established, he was, of course, to be treated by the Courts, as a slave. He knew that the Constitution requires, that fugitives from service "shall be delivered up," and he had no hesitation in concluding that the intent was as most clearly it is:—

1. That the delivery be made in the State where the fugitive is found; and

2. That this delivery shall completely restore the party to whom such labor is due, to his property in the fugitive's labor and his control over his person.

Hence it follows, "as the night, the day," that so far as it is true, that the Act of 1850 secures to the master only "the limited right of removal" of his fugitive servant, so far it is palpably at variance with the clause of the Constitution upon which it purports to be based. American Courts before this, through want of due consideration, may have pronounced statutes constitutional, which were not so; but one

feels safe to assert, that they never before 1851, construed a statute into direct conflict with that instrument, for the express purpose of sustaining it.*

* After writing thus far, I was glad to find, that the statement of the right guarantied by the Constitution to the person to whom service or labor may be due, which this essay contains, agreed with the definition given by Charles G. Loring, Esq., in his able and unanswerable argument before Commissioner Curtis.—See Trial of Thomas Sims, 28–33.

PART SECOND.

I. The Character of the Proceeding — Not Preliminary, but Final.

II. The Method of the Proceeding — There must be Due Process of Law.

"But the right to convey is the necessary consequence of a right to delivery. The latter would be good for nothing without the former. Proof of ownership gives both, if it gives either or any thing.—*Mr. Justice Wayne in the Prigg case.*

Having endeavored, in the first portion of this essay, to ascertain what is the right secured to the master by the clause of the Constitution which relates to this subject, let us from that definition, now proceed in the discussion of the provisions of this statute. The construction of the purpose of this statute adopted by Commissioner Curtis and Judge Sprague, may, in the course of further judicial examination, hereafter be set aside as incorrect, and the statute may be declared to provide a delivery, as the Constitution requires. In case, then, that the statute should be

thus construed into conformity with the Constitution, so far as its main purpose is involved, let us see if the means it prescribes for the supposed delivery, and the steps it takes toward that act, are not as objectionable, and do not make the statute as unconstitutional, as it is with the purpose ascribed to it by those tribunals. This method of investigation at least, may commend itself to the reader; for it has the sanction of the Supreme Court. The arrangement of this argument is their arrangement. Its first principles are their first principles; and upon these, and according to these, it attempts to find an answer to the questions which remain, to determine the nature of the proceeding, and the method and agencies by which it should be conducted.

I. The Character of the Proceeding. It is not easy always to understand the tenor of the arguments advanced to show that the proceedings in the case of a fugitive from service are not judicial. Sometimes, the upholders of this statute compare them with acts entirely executive in their character; but they do not mean to assert an entire similarity between the two; for that would imply that Congress had committed an egregious error in entrusting to the Courts and their ministerial officers, duties which properly devolved upon the executive authority of the United States, or of the several States, one hardly knows which. If they have any distinct notion upon this matter, I have preferred to assume that it was this, viz: that the proceedings under the Act of 1850 are judicial in their nature, but not fully judicial in the constitutional sense of that term; not judicial "to the fullest extent;" but only *quasi*, semi judicial; that they are in exact terms, the preliminary part of a judicial proceeding. This interpretation renders their arguments somewhat intelligible; and removes some contradictions otherwise irreconcilable.

This is the view taken (incidentally stated) by the counsel for the State of Maryland, in the Prigg case. He says:*—

"It provides for the preliminary examination of a fact, for the purpose of authorising a delivery and removal to the jurisdiction most proper for the final adjudication of that fact; to the State on the laws of which the claim to service depends."

Also Mr. Webster, on the 15th of May, 1850, and in the first part of his letter "To Citizens of Newburyport," stated the same position.† So far, he declared, the delivery of fugitives from justice and that of fugitives from service, were similar; and this is what Judge Sprague and Commissioner Curtis seem to mean, when they talk of an essential analogy between the two clauses of the Constitution providing for the delivery of each. To understand them to assert more than this, is fatal to their argument; and, though the fuller assertion is hereafter treated, yet the modification probably does contain, and for the present, is considered as containing, their real meaning.

It is not difficult, however, to understand why these proceedings are said to be preliminary. One may wonder that Courts and officers of law, anxious to serve the purposes of slavery, should, as has been shown, unwarrantably limit the right of a master of a fugitive from service. It is, because this interpolation of a "limited right of removal," is thought to make the proceedings preliminary. They are considered to be of that character, because they are said to result in giving to the master only a limited right to remove his slave back to the State whence he fled, to terminate in conferring, as Judge Sprague says, "an authority for transportation, nothing more." But it has been shown, if the preceding part of this argument be correct, that the Constitution knows no limited right of removal; and that, therefore, so far as

* 16 Peters, 563.

† Works of Daniel Webster, Vol, II, 568.

this process of reasoning is necessary to determine the character of the proceedings, they cannot be preliminary, under the Constitution, nor under a constitutional statute. The absolute delivery, which that instrument requires, makes them final.

Before, however, we make any use of this conclusion to carry forward the argument, there is open to us, another view of the question. Let us inquire, whether, without any reference to the words of the constitutional clause, simply under the statute, there is that which will allow us to deem the proceedings preliminary, whether the removal which it provides, is such a removal as alone can make them of that character, whether it does not involve the whole question at issue between the parties, and lead them into their respective final relations; whether the statute does not actually provide for a delivery, somewhere, and at sometime in the process. The interpreters whose construction has been cited, may deem that they only erred in adhering too closely to the Act of Congress, and in forgetting the phraseology of the Constitution. But let us see, whether they followed the statute, whether they carefully read all its sections, and correctly defined the plainest legal differences. If we go over ground already occupied by able men, who have, with forcible and sound argument, attacked this Act of Congress, it will only be, to repeat and confirm their positions, to show that their objections to its constitutionality have been evaded, not answered, and that they are, in fact, unanswerable.

THE PROCEEDING IS NOT PRELIMINARY — not so under the Constitution, as has been shown; nor even under the Act of September 18, 1850.

Preliminary is not an adjective that supports itself; it requires an adjunct. A preliminary proceeding must be preliminary to something else, and that, not a placing of one of the parties in the enjoyment of the right in dispute, with-

out limit, but to some further legal investigation. Its determination must tend towards that further investigation. The officer must know what the tribunal is, before which the final proceeding is to be had; and his decision, or whatever act or paper closes the proceeding before him, must recognize that tribunal, and his relation to it. These are the essential characteristics of every preliminary proceeding; in the discussions under this act, they have been entirely overlooked, and thus, the distinction between preliminary and final has been missed.

So is it with the ordinary offices of a United States Commissioner. He may take bail and affidavits in civil cases. That is, he may take the agreement of one person to answer for the appearance of another person, before a certain specified United States tribunal, at a specified time, to answer to a certain action already commenced; or he may take an affidavit to be used in the same, or in some step ancillary to that process. He may take depositions, or imprison persons for trial in the Courts of the United States. In these cases he knows the Court and the term of the Court, the case, and the parties who are to appear in that Court. These facts are brought to his knowledge, in the papers upon the authority of which he acts; and they appear in those which contain the result of his action. So is it with the executive authority of a State, when he delivers up a person charged with crime. Likewise, the Sheriffs, Auditors and Commissioners of Insolvency all know the Courts, to whose final adjudication their proceedings are preliminary. They act under the eye of the Court; they have the questions committed to them by the Court, and when they have concluded their examination, they make return to the Court. Their proceedings, from beginning to end, are a part of the Court's proceedings, and so, at once, the papers will show. It is a

privilege of these officers that they know what they are about.*

But the Commissioner, who certifies that the captive before him is a fugitive from service, does not know, from the papers in the case, that there is to be any further legal proceedings of which his examination is to be a preliminary part; the act of Congress which he is administering, knows

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* I have omitted any reference in the text to another officer, whose duties have been considered as analogous to those of a tribunal called upon to decide between a claimant and an alleged fugitive from service, the Commissioner of Patents. (See Commissioner Curtis's Opinion, Trial of Thomas Sims, 41.) It is certain, that the remarks offered in regard to the other officers named, will not apply to him. He, surely, makes no return of his doings to any Court. The argument deduced from this office, I may as well, perhaps, frankly confess to be unanswerable as to attempt to refute it. But what I cannot assail as an opponent, may I not, in a friendly spirit, venture to criticise? May I not suggest, that precisely here, where that phrenological faculty was most needed, breadth of comparison failed the Honorable Court? May I not offer to supply an illustration, which escaped his mind, and which will exhibit the full force of his reasoning?

If I mistake not the facts, the Legislature of Massachusetts has offered a reward of ten thousand dollars to the person who shall discover the true nature of the disease, which has, for some years, so terribly raged among the potatoes; and, if I am further correctly informed, the Governor of the State is to decide to whom this reward rightfully belongs, and to give to that individual a warrant for its payment. Now this is most clearly a case of a decision (irreversible even, I presume) of a right, and that too the very right so often alluded to in this essay, the right of property, by an officer who is not a judicial officer. This cannot be denied, and that class of politicians who complain loudest of the Act of 1850, will find a counterpart to one of its most objectionable features, in their own legislation.

When the attempt has been made to point out any essential difference between this duty of the Governor, and the decisions of the Commissioner of Patents, I may, if there remains any necessity for such a demonstration, feel called upon to show, by serious argument, that it is a mockery of law to attempt to reason from the distribution of governmental favors and rewards, to the administration of justice, between contending parties.

none such; and he is not sure that the statutes of Georgia provide for any; he does not know, however, but that there is a trial there allowed. He does not commit the captive to the officers of law at all, much less, with orders to have him, at a certain time, in presence of a Court. Yet, still he thinks this proceeding is preliminary; he is certain that he is performing only a ministerial act; though from the statute he knows no tribunal having final jurisdiction over the case, to which his act is to be returned. He does not know the Court to which he is humbly ministering. He does not find its title in any of the documents; he has forgotten his spectacles, and is not very good at remembering names. Just at this moment, it has slipped his mind, and he will have to omit it in the certificate.

Were any other ministers ever made to work in such doubt as to what they were doing, such Egyptian darkness as to their duty, as these eclipsed Commissioners? Did any other legal officer ever have to make bricks without straw like this? Had ever ministers of law or gospel such need of faith before? In the centuries of legal proceedings from the earliest days of England until September, 1850, did an officer of law ever pronounce his own proceeding to be preliminary, *when he did not know that it was so*, and *to what* it was preliminary? Did one ever decide the character of his own act from mere guess, and upon probability? Before these unselfish Commissioners, who go forward with such childlike confidence, was there ever an officer of law, who would not refuse to act, if he did not clearly understand whether his act was to be preliminary or final?

But, it is said, there may be a trial in Georgia. By this statement, it may be intended that we should understand, that, after the master has recovered the fugitive according to the provisions of the Act of Congress which prescribes his legal remedy, and has brought him back to the State of

Georgia, whence he escaped; that State may, by her statutes, require him to substantiate his right to his service, by a trial in her tribunals, before he can exercise the powers of a master, as in the case of a fugitive from justice, there is a trial, after removal, before sentence and punishment. If this be its meaning, (and no other trial than this, under Georgia's laws, could make the proceeding preliminary) one has only to perceive its connection with other parts of the process, in order to see its absurdity. The only thing to be done with fugitives from service, is to deliver them up to those to whom they owe service or labor; and as this delivery is to take place in the State where the fugitive is found, and as the fact of *service* must first be proved, as the fact of *guilt* in the other case must not, to bring them within the constitutional description, and justify the delivery, of course, the whole trial must be there also; must be before, not after the judgment and execution.

Furthermore, the tribunals under the Act of 1850, do not know that the laws of Georgia provide for any such trial; they only *presume* that they *may*. But they have an unhesitating trust, a sure, unshrinking confidence in the correctness of this presumption. If they would attentively read the opinion of the Court in the Prigg case, which they very much quote, they would see that, whether Georgia has such statutory provisions or not, is a question not worth their ascertaining; for in that case it was decided, that all such State legislation was unconstitutional, and of course void; for the power of legislation upon this subject was, exclusively, in Congress. The members of the Court were not unanimous in this opinion; but they all agreed that any State legislation was invalid which retarded the constitutional right of the master.

It is not here denied, that the Court had in their minds the legislation of the State where the fugitive is found. But it

is plain that the principle of their decision is unlimited, and so, with marked emphasis, is a portion of their language. "Would not," said Mr. Justice Wayne, "a postponement of the trial of a fugitive owing service or labor, for one month, be a loss to the owner of his service, equivalent to a discharge for that time?" Most certainly, if ever it would be equivalent to a discharge, it would be so, when required after a trial and a decision from a competent tribunal, upon the question of service or labor. It would make little difference to the owner, in which State the postponement took place. A State cannot impair a right conferred by the Constitution of the United States, upon her own citizens, more than any other State can do the same. Now, it would most clearly be an impairing of the right of a citizen of Georgia to his property, if after following its escape and recovering it, in precisely the manner which Congress had prescribed, that State should say to him, You shall not enter into the enjoyment of this property, until you have risked your right in another process of law. The State cannot interfere with the remedy prescribed by Congress. Judge McLean alone was of opinion that the statute of Pennsylvania was not unconstitutional, because it did not conflict with the Act of 1793, not forbidding what that allowed, nor interfering with the master, if he followed the directions of that Act; but this hypothetical statute of Georgia adds to a full compliance with all the requirements of an Act of Congress, its own work of supererogation; and would of course be void, from the character of its provisions, as well as from the fact that the subject was entirely beyond State jurisdiction.

Therefore, there is not only no such trial known to be provided by the laws of Georgia, for the completion of the investigation of the question which is tried before a Judge or Commissioner, under the Act of 1850, but also, *there can be none such.*

If there could, it would be early enough, even in that case, to call the proceedings of the United States tribunals, preliminary, when we could find them legally connected with those other proceedings: implicitly, at least, in the Act of Congress providing for such proceedings, and *expressly* in the papers of the case, as when a demand is made for the surrender of a fugitive from justice.

But still, it may be insisted, there may be another trial in Georgia. If, contrary to the general principles of law, which attach to the decision of a competent tribunal, a conclusive force, as to the same right, between the same parties, there could be any trial whatever in Georgia, it is, in this connection, sufficient to say, that it is *another* trial. Yes, another and a different trial; and the fact that it is so, and not a continuation and completion of the investigation here begun, settles the point that this is not preliminary to that. The only trial that there could be, is of a suit for his freedom brought by the alleged slave against his actual master. The proceedings before the United States tribunals are one step in the progress of that suit! The slave is sent back in order that his suit against the master may be properly brought! How (as has before, been asked,* but not answered,) can a proceeding in which James Potter claims Thomas Sims, alleged fugitive, be preliminary or ministerial to a suit in which Thomas Sims claims his freedom from James Potter, his master in possession! Is there any legal connection between the two?

Yes, there is some connection between them. The one sends him into slavery; and the other is an attempt on his part to get out again. The one is preliminary to the other, precisely, as an illegal imprisonment is preliminary to a writ of *habeas corpus* to obtain release, or a suit for damages; but

* Hon. Horace Mann's Speech at Lancsster, Mass., May 19, 1851. See his "Letters and Speeches," p. 494.

no one, I think, has ever yet suggested, that these subsequent suits, at all, affected the legal character of the precedent act. No one has ever intimated, even after they were instituted, that they related back, and made the original imprisonment a mere preliminary proceeding; much less, that before they are brought, their mere possibility can work such effect; that they had such a *Pre-Adamic* power as this. Imagine a magistrate saying, to a prisoner before him, on criminal process, "I know that the jurisdiction over the offence with which you stand charged, is not in me: I am not a competent tribunal to determine the question of your guilt or innocence; but the proof of guilt seems sufficient for the purpose of this preliminary investigation; and I shall commit you to prison, not until the next term of the Supreme Court, or any other Court; but for no special purpose, for the space of five years. But I would have you, by no means, on this account, to consider this a final trial and decision; for, there lies the great right of the writ of *habeas corpus*, and if you sue out that writ for your deliverance, as you probably will, my act will be merely preliminary to that." Imagine this, and you have in your mind, the exact counterpart of a Commissioner under the Act of 1850, whether he practice under the shadow of a limited right of removal, or in the light of a constitutional delivery; and that too, in the best supposable aspect of his legal character.

"But the question here is, whether the government of the United States, in making the surrender it has stipulated to make, is constitutionally bound to stipulate for a trial; and whether, because it has not made such a stipulation, its omission to do so, makes these proceedings final and conclusive, instead of ministerial."* Stipulations! Stipulations! What has the legal mind to do with stipulations? Who says stipulations? We are bound to know the legal purpose

* Commissioner Curtis. See Trial of Thomas Sims, 43.

of legal acts. Whether an officer may not, possibly, assassinate a fugitive from justice, or a master, his slave, after each has been delivered to each, we need not ordinarily inquire. But the avowed character, in which these are claimed and delivered, and the purpose which is set forth in the papers, or which arises by inevitable inference from that character, we are not at liberty to wink out of sight.* We do not venture to do this in the surrender of a fugitive from justice; and we ought not to do it, in the delivery of a fugitive from service.

The State comes after the former, with the commencement of a trial in her hands, with the avowed purpose of a trial on her lips; and we are not, at present, base enough to doubt her sincerity. Until the American States become as faithless to each other as some already are to their own inhabitants, we will confide in their honor. By the same token, we are bound to understand, that the slaveholder will carry

* A copy of the documents in a case of a demand of a fugitive from justice, is before me. The first is a complaint before a magistrate, with prayer that warrant may issue against the persons therein named, and they "be dealt with according to law." The second is a warrant directing them to be brought before a magistrate, "that they may be dealt with as the law directs." Are the directions of the law in such cases, that they shall, on the strength of that complaint alone, be punished? Are they at all doubtful? Are not those words as so used, an explicit reference to a trial? The third document is a return of an officer, that the specified individuals are not to be found in the County; and the fourth is the demand of the executive authority of the State where these proceedings are had, upon the executive authority of another State, within whose territory the fugitives are supposed to be, wherein the former informs the latter that he has appointed an agent to receive and convey the fugitives to a certain County "*to be tried* for the offence with which they stand charged;" and requests that they may be delivered to such agent "for the above purpose." I even find in an old book of forms that the warrants long ago in use, in Massachusetts, for the apprehension of the fugitive and for his confinement for safe keeping plainly set forth as the end of all these proceedings, that he be sent back "to said State *for trial*." Documents accompanying Message of Gov. Kent to the Legislature of Maine, Jan. 2, 1839.

out his avowed purpose. We are not at liberty to infer, or guess that he will take any other course. He comes for the fugitive, with no declaration or pretense that he claims him for the purpose of a further trial: not a single paper he brings with him, refers to any further judicial proceeding, or contains in connection therewith, the name of another tribunal; and we are bound to know that there is no other trial intended.

The State takes its fugitive as *charged* with crime. It would be a base suspicion to infer, that a State would punish a man who is only *charged* with crime; and good faith rightfully requires us to trust, that she will give him a fair and impartial trial, before he is condemned and punished as *guilty*. The pursuing master claims his fugitive as actually held to labor, as his slave; and good faith, as well as common sense, requires us to believe that he will treat him as such. The Richmond auction block and the Savannah jail witness that the slaveholders rigorously keep their faith, and make this claim good. Long's sale and Sims' stripes bear unimpeachable evidence that they carry out their avowed purpose.*

If the State demanded her fugitives as actually *guilty* of crime, as actual convicts, then good faith would not require us to presume that they would have any further trial. On the other hand, we should, then, be required to shape our proceedings as though they were to be surrendered to instant punishment, as we ought, now, to try the rights of persons

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* Henry Long was sold to pay the costs recovered against him, in the *final suit* in Virginia; and Thomas Sims has been carried before a judge and jury in Chatham County, Georgia, and refused to plead in answer to the action of his master, and has since been whipped "*for contempt of Court!*" No one dares say this; and yet the circumstances must be explained upon some such hypothesis, if the proceedings under the Act of 1850 are *merely preliminary*.

This was one of the chances of the law, a Commissioner may say. I

claimed as slaves, on the basis of their delivery to immediate slavery. With the papers in the case before him, with the Act of 1850 open in his hand, it is a most unnatural presumption, a most illegal inference for an officer of law or a court of justice, to go out of these papers, to look beyond the Act which gives him power; and begin to guess, to weigh probabilities, and calculate the chances that there may, possibly, be another trial of the rights of these two parties; and then say, that Congress was not bound to make stipulations for such a trial; and I may consider this proceeding preliminary. It would seem to be enough for such a tribunal, to know that its whole authority comes from an Act of Congress; and that, under God, and the Constitution, the laws of Congress are the supreme law of the land and when Congress has made an investigation, and an act of law preliminary to no other proceeding, ancillary to no other trial, ministerial to no other court, it is not within the scope of its authority, to deny that it is final.

The Act of Congress does more even, than this; of course, it would not prescribe something to be done, and leave its character doubtful. We only need carefully read its provisions to find that the proceeding is final. Judge Sprague and Commissioner Curtis both agree, that it is the purpose of a legal proceeding, the result of an investigation, which gives

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meant to make the proceedings preliminary; but things took a different turn after they left my hands. Never before did the character of legal proceedings hang upon chance.

There has been a most obstinate effort to conceal the termination of these fugitive slave cases, and to make these unfortunate Africans, as the old geographers tell us of their native Niger, lose themselves in the sands, before they fall into the shoreless ocean of slavery. But the direction of the current cannot be hid. We hear shrieks and catch glimpses of the victims, hopelessly buffeting the billows; and know whither they have gone from among us forever.

to it its peculiar character.* Let us apply this rule to the question before us. What is the decision of the tribunal, when satisfied with the proof brought to substantiate the claim? What is its legal import; not, what may, possibly, be the course or relations of the two parties; but what is the result? Does he commit the fugitive for trial? Does he even send him to Georgia or any other State, *for the purpose* of trial? If so, this proceeding is preliminary. But, if he delivers him over to his master as his servant, as the Constitution requires, or even sends him to Georgia to be so delivered; then the proceeding is final.

Not even the limited right of removal (were it a substance which it is not, instead of a shadow which it is) could alter the character of this proceeding. The purpose controls the character of the process; and when we are told that the purpose of the examination is to ascertain the right of removal, we must go further with our inquiry, and ask for what purpose is the removal to be made? Here, it is submitted that the tribunals, who have recognised this "limited right of removal," could very much relieve the whole matter of the difficulties which now hang round it, if they would, with the same emphasis, with which they have defined the proceedings of a tribunal in the case of a fugitive from service, define the result of those proceedings. The very darkness which now hangs over the issue of this removal, leads to a strong doubt, whether it could possibly have a legal existence. Its head only has been reported by a few naturalists of a select school. They have not attempted to delineate the rest of the animal; and perhaps, for fear that their description would show an incorrect classification, or

* Perhaps, the true statement of this principle of law, is, that the fact in issue and proved in the investigation, determines the rights of the parties, and the action of the tribunal. But, for the present, let the statement from the above officers, stand without criticism.

exhibit a *lusus naturæ* that would make their pretended science ridiculous. They have discovered a new right, not laid down in the books, a simple transportation from one State to another, a power of picking a man up in one place, and setting him down in another, without the least variation in his legal condition. But the object of this removal from one State to another, the legal end of all this "hurrying to and fro' and mounting in hot haste," the purpose of the transportation, they say nothing about. We would not perplex them with supposed cases of fraud, or ask about "stipulations;" but we want to know, in the order of things what comes next. According to the bill, according to the bill, what is the last performance of the evening? The fugitive is not carried away, as a pauper to relieve us from the charge of his support, nor as a convict to be banished, nor as a person dangerous to the State to be prevented from doing mischief, nor yet, say they, as a slave to the horrors of slavery. What, then, is his legal character, and the purpose of his travel?

Can the Federal officers say, that, by due course of law, that, naturally and necessarily, unless both parties consent that it shall be otherwise; *this removal will lead to and terminate in* a further trial of the question now at issue between these two parties? If so, and only so, let it be deemed a preliminary proceeding.

But this they cannot say, without contradicting the provisions of the Constitution upon this subject; nor even under the Act of 1850, which, with all the inaccuracy which may be found in its sections, does not attempt, like this construction and to this extent, to destroy or limit or postpone the enjoyment by the master, of his constitutional rights. It sets aside this pretext of a further trial. The 9th Section, which is the only one that leads us into the State to which the removal is to be made, declares the purpose, and fixes

the character of that removal. It says, that the officer shall there "deliver him to said claimant, his agent or attorney," without restriction or limited purpose — as his own. The whole proceeding ends in giving to one party all that he demands. The property which was out of his possession, and of which his ownership was denied, is, completely and without qualification, restored to him. This is, even now, the only legally possible end of the proceedings in the case of a fugitive from labor; and terminating thus, it is idle to call them preliminary and ministerial.

Substantially the same purpose of the statute appears also, as has been pointed out by Mr. Loring,* in the 10th Section, which, after prescribing the manner in which the evidence that a person is held to service or labor in a certain State and has escaped therefrom, shall there be taken, in order to establish those facts in the State to which he has fled, provides, that, upon proof of the identity of the captive with the person described in the record as so held and as having escaped, "*he or she shall be delivered up to the claimant.*" This section alone seems to provide what the Constitution requires — a delivery to the master in the State where the fugitive is found and seized. This enables us to interpret the nature and force of what is done, or what the statute ought to require to be done, by the tribunal administering its provisions, in the case of a successful claim. In the light of this section, we must say, that the tribunal is required, when satisfied of the identity of the party as named in the record, to deliver him to the claimant as his servant or slave; and then, the statute provides, that this certificate shall secure to the master, in addition to the rights which the fact certified would give him, under the laws of his own State, the further authority to convey the fugitive thither.

Admit now, that the master's right of removal, as before

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* See trial of Thomas Sims, 28–33.

supposed, might constitutionally be confined to a single State, and that he could only convey him back to the State whence he fled; yet who does not see, that this is not the essential part of this process, but that, on the other hand, the trial is consummated by the absolute delivery which precedes this; that this "authority for transportation" is a mere incident, "nothing more;" that, instead of being a limitation of the master's right, it is a special authority added thereto, or rather, expressed in addition thereto, in order, as Judge Wayne defines it, to give practical value to the previous delivery, and to secure to the master the actual enjoyment of all the right which that delivery fairly and legally implies? Who would think, that this subordinate privilege would come to override the precedent and principal right; that this incident could attain to such importance as to change and fix anew the purpose and meaning of the statute, and become the chief staple of judicial reasoning and corner stone of construction?

From this point, let us look at the provisions of this statute. Sections 4 and 6, which profess to be the governing sections of the Act, and which the courts rely upon as defining the right which it intends to secure to the master, and, therefore, as fixing the character of the proceedings and justifying their summary method, give under the certificate, only "a limited right of removal." Yet Section 9, operating upon the same cases, sets aside this right, and in place of an empty right of removal at his own charge, gives an actual removal at the public expense, and then, as its termination, an absolute delivery to the possession of the master. It does all this,—and this is the most marvellous and illegal characteristic of this anomalous statute—it makes this substitution of rights, this essential and entire change in the nature and effect of the judgement, after the court or

tribunal has pronounced its decision, and issued the certificate, after the proceedings are finished, and one party has ceased even to *be*, in the court; perhaps, though that is of little consequence, after the court itself has adjourned, and at the mere option and upon affidavit of one of the parties. It would seem as though, at this stage of the proceedings, *this limited and special right* had done its work. It has served to turn aside the arguments of the captive's counsel, to make the proceeding seem to be a mere preliminary step; and now, that those arguments have been evaded, and the decision rendered in favor of the claimant, its limitations, if it has any, may be expected to commence their operation. But precisely now, the affidavit of the claimant is put in, and the limited right is put out: the certificate ceases simply to authorise a removal, and henceforth, authorises not only a removal to the territory of another State, but also, within that territory, a delivery to the possession and control of a slaveholding master. Others may deem these conflicting sections of the statute as designed to baffle objections that might be raised against its constitutionality; but it is, I think, a supposition more in accordance with the facts, to attribute these contradictions to a spirit of gross carelessness, pervading the Congress which enacted it. In one section, it requires the fugitive servant to be delivered to his master, in the State into which he has fled; while the section next preceding provides for such a delivery, in the State from which he escaped; and at the same time, according to Commissioner Curtis and Judge Sprague, the act cannot be made to work at all, unless, setting both these sections aside, the 4th and 6th are made the governing sections, which, as construed by them, provide no absolute delivery, but only a limited right of removal. Is there any way to reconcile these conflicting and contradicting provisions? The only way to do so, consistently with

the constitutional clause upon this subject, or with the legal relations or actual facts of any case under that clause or under this statute, is to say, that it secures to the master an absolute delivery into his hands, of his escaped servant, and, then, for his convenience, gives him authority to carry him unmolested back to the State whence he escaped. But then, the proceeding ceases to be preliminary; and in fact, whether we reconcile these contradictions or not, that is not its character; for, under no construction, does it look towards a further trial.

Before leaving this division of the argument, it is proper to say, that the Supreme Court have decided this very point. They have declared, in the leading decision upon this subject, that this is a "*case* arising under the Constitution." The flexibility of the law is sometimes a matter of boast among the admirers of the science of jurisprudence. This quality is carried to its highest degree, by the tribunals who sustain the constitutionality of the Act of 1850, when its unconstitutionality is ably pressed upon their attention. The Law seems actually to become liquid in their hands: the established distinctions cease to be fixed; and the whole code, common and statute, flows together, in one direction, from freedom into slavery. It is so in this instance. The highest tribunal in the land calls the process of reclaiming a fugitive from service "*a case*;" but the inferior tribunals insist that it is not *a case*, only a part and a very small part of a case: a mere preliminary step towards a case to be found somewhere; but no one knows whether on this side or beyond Cape Horn. Let us not follow this liberal construction. Let us understand the Courts as they say. Let us take the Reports as they are. Then, we shall see that this is a case, a whole case, an entire case, with all the essential elements of a case.

It is a Final Proceeding, and terminates in a final judgment.

Blackstone says :—

"Final judgments are such as at once put an end to the action, by declaring that the plaintiff has entitled himself or has not, to recover the remedy he sues for."

In this case, the claimant sues for the delivery into his possession, of a person whose service, he alleges, is due to him; and the court must decide that he has, or has not, entitled himself to receive this delivery, and thus, put an end to the action, by making the delivery sued for, or by discharging the captive as a person not owing him service or labor.

According to the statement before quoted from Blackstone, it is the effect of the judgment, in the suit in which it is given, that determines whether it is final or not; and we are not to follow Judge Sprague's definition,* and inquire what will be its effect upon some future suit involving the same issue between the same parties, in order to ascertain its character. It is undoubtedly true, that final judgments are, by the general principles of law, conclusive; but it does not necessarily follow, that conclusiveness is the essential element, the distinctive mark of a final judgment. It is rather an attaching incident. In the discussion upon the force of foreign judgment by Mr. Justice Story, † would it be correct to follow his distinctions, and when he states, that a judgment under such circumstances is conclusive, to mark that as final; and when he states, on the other hand, that a judgment under such other circumstances is not conclusive, to term that preliminary? That he is treating of foreign judgments instead of domestic, does not affect his statement; and besides, may not the several States, according to whose laws, the decisions in the cases of fugitives from service, are to be rendered,

* See Charge to the Jury, in the Trial of James Scott, June 5, 1850.

† Conflict of Laws, 491–516.

give to them conclusiveness, if they see fit, even if they were not so, by the general principles of law, under an express provision of the Constitution of the United States? Suppose now, that one State should choose to treat them as conclusive, and the neighboring State should regard them as not binding the parties, would the cases of fugitives from these two States, give to the respective proceedings a different character, and make one final, while the other would be preliminary? Most clearly, there could be no such distinction, depending upon an accidental circumstance that might be known or unknown to the tribunal, between proceedings, in themselves, exactly alike. Yet, it would be so, if Judge Sprague were correct in his definition. There is other authority also, besides Blackstone and Story, to show that conclusiveness is an attaching incident of a final decision. Professor Greenleaf, in treating of Records and Judicial Writings, says, "it is for the interest of the community that a limit should be prescribed to legislation; and that the same cause of action ought not to be brought *twice to a final determination.*"* If it was the very essence of a final determination, that it should never be re-examined, how could a jurist speak of a cause coming twice to a final determination, and say that "the interest of the community," and the obvious principles of justice require it to be otherwise.

It is, according to these authorities, enough for the tribunal, to know, that its decision has a final effect in the case which it decides. Yet, it may add to the force of this argument, to offer some considerations which tend to show, that the decision of these cases cannot again be re-opened and examined.

Supposing that the constitutional requirements and the principles of law should be complied with, in all of the proceedings in these cases, in the constitution of the tribunal and the manner of taking the evidence, (as they are not now),

*Greenleaf on Evidence, Vol. I., § 522.

supposing this (and without this supposition, the act of the tribunal has no validity); then it will be seen, at once, that the decision of one of these cases is conclusive. It is the judgment, not only of a competent tribunal, but of a tribunal having exclusive jurisdiction; for, the tribunals to whom Congress commits the delivery of fugitives from service, alone, must be empowered and required to ascertain who are fugitives from service; in other words, whether a person brought before them as a fugitive, really owes service or labor, under the laws of another State, to the claimant; and having determined that fact, according to the general principles of law, their decision must conclude the mutual rights of these two parties, in any subsequent suit. It is worthy of remark also, that it is, either a decision upon the *status* of of a person, as the words of the clause would seem to indicate, or a judgment *in rem*, as Judge Story regards it;* and that both of these have something like a special and superior conclusiveness.

This is precisely the view taken by Mr. Crittenden, Attorney General of the United States, in his letter of legal advice to the President, when the latter had the Act of 1850 before him, for his signature. Unconsciously, I have nearly followed his words: they are as follows:—

"The whole effect of the law may be thus stated. Congress has constituted a tribunal with exclusive jurisdiction, to determine summarily, and without appeal, *who are fugitives from service or labor*, under the Second Section of the Fourth Article of the Constitution, and *to whom such service or labor is due*. The judgment of every tribunal of exclusive jurisdiction, where no appeal lies, is of necessity conclusive upon every other tribunal, and, therefore, the judgment of the tribunal created by this Act, is conclusive upon all tribunals. Wherever the judgment is made to appear, it is conclusive of the right of the owner to retain in his custody, the fugitive from his service, and to remove him back to the place or State from whence he escaped."

In regard to the limiting effect of the last sentence, if it

* 16 Peters, 624.

should be supposed to have any such effect, it is sufficient to repeat the question, What is the purpose of this removal; and to refer to the 9th section for the answer, that it is, that he may there hold him as his own, and to say, that the conclusiveness covers the removal with all its legal purposes. The definition of the master's right, in that sentence, is worthy of notice. The words are, "the right of *the owner to retain in his custody*," "*and* to remove;" not the right of a person, other than the owner, to retain *for the purpose* of removing. The certificate, then, concludes the right of the owner; and here, this letter agrees with the expression of Chief Justice Taney, when he calls it "the certificate of ownership."* Of course, he could call it nothing else, nor did any other member of the Court speak of it differently.

It is also worthy of observation, that it will be more creditable to the legal character of the Attorney General, if we consider the remark of the last sentence as applicable, not to the substantive right of removal, which the advocates of the Act of 1850 undertake to build up, but to the constitutional right of removal, which Justice Wayne lays down, which is incident to a delivery, which, in its turn, is based upon proof of ownership; and that, therefore, any decision, which is conclusive for this incidental purpose, is *a priori*, conclusive of the fact which gives rise to it, to wit: the fact of absolute ownership. In no other way, can it be conclusive of the right to remove. The correct way of stating the law as to the conclusiveness of judgments, seems to be, to say that they are conclusive as "to that which was directly in issue" in the trial, and to that alone.† Now, in the trial of an alleged fugitive, the question of held to service or labor in another State, is that which is directly in issue; and if

* 16 Peters, 631.

† Greenleaf on Evidence, Vol. I., § 538.

the decision of the tribunal before whom the trial is had, is conclusive of anything, it must conclude that; for, that is the main question directly in issue. The claimant does not allege that the captive owes him a return to the State whence he fled, but that he owes him service or labor after he has returned; and it is only because he owes him this service, that he gets any right to remove him thither; it is only because the tribunal judicially determines this fact in issue, that its decision is conclusive evidence of the master's right to that service, and, therefore, of a right to remove him where he may enjoy that service or labor.

Here, is to be seen another contradiction of high official authority, by tribunals desirous of sustaining this statute. Commissioner Curtis did not allude to this opinion of the Attorney General; and Judge Sprague, while he attempted to sum up the authorities in favor of the statute, shunned this official letter, though he quoted from an unofficial letter of Judge Grier, upon the same subject. Neither of these officers could cite this letter of Mr. Crittenden, without summoning an authority to contradict their own construction. He had written to the President, that the bill before him authorized the tribunals to determine "*who are fugitives from service or labor*," and "*to whom such service or labor is due;*" that this determination was the judgment, not the preliminary decision, but the judgment of a tribunal having exclusive jurisdiction, and, of necessity, *conclusive* upon every other, and upon all tribunals; and therefore, he said, it may rightfully prevail against the *habeas corpus*. This opinion, undoubtedly, is not binding as the decision of a Court. Judge Sprague and Commissioner Curtis, without dispute, may set it aside, if it is incorrect. But is it incorrect? Did the Attorney General mislead the President; and inform him that a decision was final and conclusive, which was not so? Was the signature of the President obtained

for this Act, only by a gross mistake, upon the part of the law officer of the Cabinet, when called, formally and solemnly, to advise the executive?

It is, at least, singular, that the approbation which changed that bill into a statute, should be given to it, only upon the assertion of an opinion to a certain effect; and that, afterwards, Thomas Sims, defended by the arguments of Mr. Rantoul and Mr. Loring, could only be carried out of Boston, and the alleged rescuers of Shadrach could only be put in peril of conviction and punishment, by the denial of that, and the assertion of another opinion, directly opposite. Judge Sprague even declared, that this certificate could not protect the claimant, in an action of assault and battery and false imprisonment, committed in the original arrest; while the Attorney General says, it is conclusive, everywhere, of the fact of owing service, on the one side, and of the right to exact it, on the other.

The character of the proceeding is an important element in this discussion. The supporters of the statute of September 18, 1850, rely upon what they deem to be the preliminary character of the process, to sanction its summary method. If the proceeding is preliminary, they feel able to justify that method, affording, as it does, to the captive neither the scrutiny of a judge, nor the vigilance of a jury. If, on the other hand, the proceeding is final, then, it is admitted, that these old formalities of the law cannot, constitutionally, be dispensed with.* As this preliminary character has been made to depend wholly upon a limited right of removal which the proceeding is alleged to result in conferring, it may be well, here, for the sake of clearness, to recapitulate the arguments upon that point, before we pass on to see what other consid-

* See Trial of Thomas Sims, 44, and Judge Sprague's Charge.

erations may be found, to confirm and corroborate their logical result.

First, however, the writer does not mean to deny the assertion of other opponents of this statute, that this limited right of removal, in reality, and to all practical legal intents and purposes, has no limits; that its pretended restrictions have no coherence with the fact certified, or with the course of the proceedings; that there is no power in the certified fugitive to procure their enforcement, if there be any authority in any Courts to enforce them, and that, in their best state, these restrictions would be only a vain attempt to cramp and narrow a constitutional right of the person to whom service or labor is due, and to this point, he cites the decision of Judge Woodbury, in the case of Sims before him, upon *Habeas Corpus*, as a prisoner under the certificate. Therefore, this much boasted, many-voiced, special and limited right has no power to affect the character of the proceedings under this Act.

Secondly, adopting, for the present, to its "fullest extent," the position laid down upon the other side, that it is the purpose of a proceeding, which fixes its legal character, he maintains, that every legal act has a known legal purpose, set forth in the papers before the Court, and recognized in the law which gives the tribunal jurisdiction over the parties; that this removal must also have its law-recognized purpose; that its purpose is not known to be a further trial of the issue between the two parties; and that, the claim having once assumed the shape of a contest awaiting judicial decision, without the knowledge of such further purpose, thus brought home to the notice of the tribunal, no person, who sits upon the bench, should dare to call it—preliminary.

The uniform course of preliminary proceedings, and particularly, the course of the officers cited by Mr. Curtis as

discharging duties that are merely preliminary, sustains this point.*

Following this reasoning to its positive side, it is here contended, that, even under a certificate, this removal has a purpose known to the law, to wit: the entrance by one party into the enjoyment of all the right for which he sues, and the rendering of the other into the ultimate, the ultimate condition, from which he prays to be rescued; and to the support of this position. besides the papers in every case, the character of the parties therein set forth, and the purpose necessarily implied, the fact certified, with its inevitable purport and consequence, there are the words of the 9th section of the statute, which make the proceeding ultimately terminate in an absolute delivery of one party into the possession of the other, without restraint or limit. The transfer of this absolute delivery, from the State where the fugitive is found, to the State whence he fled, if the point first stated in this essay be correct, is undoubtedly unconstitutional; but it does not change the character of the proceedings. An absolute delivery of the person contended for, made anywhere, makes the proceedings which it terminates—final.

To sustain this point, and show that the right of removal is an incident, not limiting, but additional to, a full delivery, he cites also the 10th section, where this right of removal is made to follow such a delivery, merely as its additional incident.

Thirdly, though first in the order of this essay. Turning back from the point in this discussion, where is first introduced as an element in the argument, this limited right of removal, turning back thence to the Constitution, he has endeavored to present the right secured to the person "to whom service or labor may be due," as written in the Con-

* Ante, 42.

stitution itself, as defined by the Supreme Court, as recognized by State tribunals, and confirmed by collateral considerations. The Constitution prescribes a delivery; and if any statute provides a different right; then, that very difference makes the statute unconstitutional.

Moreover, the constitutional right is to an absolute delivery, based upon the right of property, requiring as a condition precedent, the proof of ownership.

II. The Method of the Proceeding. Before each and all of these three propositions, if they or either of them be correct, falls, by the admission of its supporters, the Act of September 18, 1850, with its summary proceedings, and with it, the Act of 1793: fall also the chief arguments, if they can properly be termed arguments, which the writer has seen adduced to these statutes' support. Upon these, each and all, by connecting stones that need not here be recounted, supported with pillar and buttress reared mainly by others, and confessed, by their adversaries, to be firm, rises for the alleged fugitive, in all the dignity and majesty of its full proportions. the grand structure of a due process of law; due process of law, brought to perfection, by the labor of Anglo-Saxon architects, through a hundred generations, and framed into the Constitution, by our forefathers, that it might protect every inhabitant of the land, with its just presence.

There must be for the alleged fugitive, the presence of a Judge, holding office during good behavior, and receiving, at stated times, a fixed compensation, and the panel of twelve men: the judicial office and the trial by jury; not as boons of Congressional favor, to be granted or withheld by recreant statesmen, in order to sooth or conquer northern or any other prejudices, but as an organic necessity, a constitutional right, which neither Congress, nor any branch of the government can dispense with. The early arguments in

support of this position, still stand in full force and virtue, unaffected by the attempted answer that the proceeding is preliminary. Other reasons will confirm this conclusion,

Let us consider the acknowledged purport of the clause of the Constitution, which is now under consideration, and see if that will not help us to determine the necessary character and method of the legal proceedings, which the legislation of Congress, in execution of its provisions, must prescribe. In exact, definite language, we have the following statement from Commissioner Curtis:—

"It intended to declare, and it does declare, that, whatever may be the law of Massachusetts on the subject of personal liberty, that law shall not be applicable to a person who owes service or labor in the State of Georgia, simply because he has escaped within the limits of this Commonwealth; but, that the master or owner to whom such service or labor is due, shall retain unimpaired the right to that service or labor, which the law of his own State has given him."*

For the purpose of the present argument, this statement may be considered entirely accurate.

There seem to be two modes, in which a State might *discharge* a person held to service or labor in another State, who had escaped into its territory, both of which are forbidden by the Constitution; only one of which, however, was probably in the minds of its framers. They might, by direct legislation, declare that fugitives from service in another State, *eo nomine*, should, within their limits, be deemed and treated as discharged from such service. This is forbidden by the Constitution; but probably, more prominent to their apprehension was the fact, that the legislation upon the matter of service or labor, would be different in different States, and that a person held to service in one State, and escaping into another, would be discharged from such ser-

* Trial of Thomas Sims, 45.

vice, if the case between him and the claimant were to be determined, according to the statutes of the latter State. This was probably the result which they especially intended to guard against; and in this light, the clause may be considered as, not so much a restriction upon the power of the several States to legislate upon the subject of service or labor, as a restraining of that legislation from operating in a certain class of cases. This seems to be the exact view taken by Mr. Curtis in the language above quoted, "whatever may be the law of Massachusetts upon the subject of personal liberty, that law shall not be applicable to a person who owes service or labor in Georgia." Were there no such provision, the fugitive might, in the courts of Massachusetts, plead the statute of Massachusetts, and be discharged: under this provision there may still be in force, the same statute; but it can bring the fugitive no release; it is not applicable to his case; he must be delivered up. The clause seems to be merely a reaffirmation, in relation to this particular subject, of the principles of the common law, that the *lex loci contractus* shall govern such cases, with this important addition, which is sufficient, were there no other reason, to account for its adoption, that it specifies, that the remedy shall be, not in damages, which, as has been said, might be against "persons utterly insolvent or worthless;"* but in a delivery of the person into the possession and control of the master.

Carefully examine this language of Commissioner Curtis, and see also, if that which I have made immediately to follow it, is anything more than a fair amplification of its meaning; and then, determine, whether, in his words or mine, there is conveyed any other impression than that there is at issue between the claimant and fugitive, a question of

* Judge Story, 16 Peters, 61.

legal right; that this issue is to be tried by due process of law, according to the ordinary rules of evidence, and determined according to the verdict of a jury, by the deliberate decision of a Judge! Rise up from their reading, and see, if you have in your mind, the most distant idea of anything but a judicial investigation; see if any other idea lurks in the words, if you can snuff in their meaning, the faintest scent of a mere preliminary, ministerial proceeding, in which no right is determined, and no right can be determined!

Again, Judge Story, in giving, in the case so often quoted before, the reasons why this matter should not be left to the legislation of the States, uses the following language which bears with it the same inference:—

"If, then, the States have a right in the absence of legislation by Congress, to act upon the subject, each State is at liberty to prescribe just such regulations as suit its own policy, local convenience and local feelings. The legislation of one State may, not only, be different from, but utterly repugnant to and incompatible with that of another. The time and mode and limitation of the remedy; the proofs of the title, and all other incidents applicable thereto, may be prescribed in one State, which are rejected or disclaimed in another. One State may require the owner to sue in one mode, another in a different mode. One State may make a statute of limitations as to the remedy in its own tribunals, short and summary: another may prolong the period, and yet restrict the proofs: nay some States may utterly refuse to act upon the subject at all; and others may refuse to open (their) Courts to any remedies *in rem*, because they would interfere with their own domestic policy, institutions or habits."*

Now, although Congress might have no power to compel the States to legislate upon a matter left to their legislation, yet, certainly, the Supreme Court of the United States has power to set aside all state legislation not in accordance with that instrument; and we, accordingly, may presume, unless this language of the Court is used with unaccountable looseness, that they deemed these various forms of state

* 16 Peters, 623-4.

legislation as not directly at variance with the Constitution. Moreover, it is a very unjust imputation of bad faith against the States, to intimate, that, where the Constitution had plainly intended that a proceeding should have one character, the States, legislating under the Constitution, would give to it a character altogether different and even opposite; that they would change what the Constitution intended should be a mere preliminary proceeding, into a due process of law. This seems to partake strongly of the doctrine of Stipulations, that is, the doctrine that a State may not be trusted to perform a duty which the Constitution or the law devolves upon it in any particular case, without an express stipulation that she will discharge the given obligation. This doctrine has been completely exploded by Commissioner Curtis, though I find more numerous traces of it in his own opinion than elsewhere, and am inclined to think that the doctrine itself originated with him.*

A person would, I think, study this language of Judge Story, some time, before he would come to the conclusion, that the right under consideration was not properly the subject of full legal investigation. The language applies only to a regular suit, an action between party and party, to be fully heard and finally determined in open court, and not to be decided without any opportunity given to one party to cross examine the witnesses, without a jury to find the fact, or a Court to lay down the law. Why should the Court speak of "the proofs of the title," if the title is not to be tried? "One State," says the learned authority, "may make a statute of limitations as to the remedy, in its own tribunals, short and summary." But, how can a "statute of limitations," be made to work a discharge, unless it be pleaded? How can it be pleaded, unless the parties come to

* Trial of Thomas Sims, 43.

an issue? How can they come to an issue, unless there is to be a trial of their right? a final trial, and not a mere preliminary inquiry?

These remarks of Judge Story will be found consonant with the rest of his opinion; and a similar idea, more or less strongly, pervades the reasoning of other members of the Court, in the same case. Judge Wayne declared that "the States surrendering the right to discharge, meant to exclude themselves from legislating a mode of *trial;*" that "they shall not make or apply regulations to *try the question of the fugitive owing service;*" that they should not direct the mode "*how the right of property should be ascertained and determined;*" that they had no right to legislate "as to the mode of *finally determining* whether a fugitive owes service or labor:" that there were objections to the doctrine that the States might legislate "a remedy, by which the right of property in fugitive slaves is to be ascertained and *finally concluded;*" and, again, repeating this assertion with an essential limitation, he said that "having surrendered the right to discharge, they are not now to be allowed to assume a right to legislate, *to try the obligation of a fugitive, to servitude*, in any other way than in conformity to the principles peculiar to the relation of master and slave:" * and in another place, touching the very question mooted in connection with the Act of 1850, he uses the following words:—

"I deny all right in the States, to legislate upon this subject; unless it be *to aid by mere ministerial acts* the protection of an owner's right to a fugitive

* The language of this limitation is worthy of notice. Taken by itself, like the extract from Commissioner Curtis, it seems to recognise that the slaveholder was not to have a peculiar method of recovering his lost property, or to seek his remedy in a Court different from those which ordinarily administer justice between the citizens of the State where the fugitive is found, but simply, that those Courts, i. e. the State Courts, should determine his rights *according to the laws of the State where he held the fugitive as a slave.*

slave, the prevention of all interference with it by the officers of a State or its citizens, or an authority to its magistrates to execute the law of Congress, and such legislation over fugitives as may be strictly of a police character."

Judge Wayne, like Judge Story, was endeavoring to establish the position, that the power of legislation was, exclusively, in Congress; and to that end, he denies that the States may legislate for the trial of the question of service or servitude. Would he have spoken of the right to try not being in the States, if the clause upon which he was reasoning, contemplated no trial? Would he have denied to the States the possession of this right, if the right itself had no existence? Did he not deny it to the States, for the express purpose of uniting with the majority of the Court, in assigning it to the United States? If the United States have the right to legislate for a trial, it is only because the words of the constitutional clause relating to this subject, are such as to make a trial proper and necessary; because the requirement of that clause cannot be fulfilled, with a due regard to the rights of the parties, and a just respect to other provisions of the Constitution, without such trial; and therefore, it is the duty of Congress, in legislating upon this subject, to secure it. In his opinion, the legislation of the States must be restricted to "mere ministerial acts." Would it not surprise this member of the Supreme Court, to learn that the Constitution confines the legislation of Congress within the same narrow limits? Whether these extracts be mere *obiter dicta*, or whatever may be their rank in the order of judicial expressions, it is sufficient for the limited purpose of their introduction here. They are introduced to show, that the language of the constitutional clause relating to fugitives from service, does not, clearly and necessarily, fix upon the proceedings required for its enforcement a mere preliminary or ministerial character; and it is hard to believe that the phraseology of that instrument has left so important

a question in doubt or obscurity. They, as well as the quotation from the opinion of Commissioner Curtis, show, on the other hand, that, whenever the tribunals approach this subject, aside from that very question, then, all idea of a mere preliminary proceeding slips from their mind; and its place is filled with the image of a due process of law.

Turning next to the language of the clause, we find an important word standing in opposition to the word "delivered." The fugitive shall not "be *discharged* from such service or labor." What is a discharge in law? It is a decision, in any case under this clause, that the person claimed does not owe the service or labor that the other party demands. This decision may, according to the general principles of law, in any court, in the same State at least, be afterwards pleaded in bar to the same claim from the same party. Such a discharge, the tribunals to whose jurisdiction the subject of fugitives from service is committed, are forbidden to give. The Constitution then presumes, that it is within the scope of the ordinary powers of these tribunals, to give such a discharge; for it would hardly take the trouble to forbid them to do that, which, from their very nature and constitution, they have no power to do. Such a discharge, it hardly need be said, can be given only by a Judge, based, save by agreement of parties, upon a verdict of a jury as to the fact at issue. If the force of this word is here fairly interpreted, the intent of the Constitution is, that the alleged fugitive should have his rights determined in the presence and by the decision of a jury and a Judge.

In this connection, appears one of the most unrighteous and unconstitutional features of this wicked statute. It changes the whole trial into a mere preliminary proceeding, and of course, the court into a mere ministerial officer. As such, the maxim, "*expedit reipublicæ ut sit finis litium,*"

or the more forcible one, "*nemo debet bis vexari pro una et eadem causa*," does not, in the common course of law, apply to its decisions. A decision of a scrupulous Commissioner, that the alleged fugitive is not a person owing labor or service to the claimant, will not prevent the latter from procuring a warrant from another Commissioner, less scrupulous about the evidence, and completely willing to send human beings into bondage, who, upon a summary examination, will give the required certificate, and sentence a man, once declared free, to hopeless slavery. But, only on one side, does the decision of this tribunal leave the question thus open to re-examination. If the decision be in favor of the claimant and against the liberty of the captive, then, by the express provision of the statute, it is conclusive; and no process can procure an examination into its accuracy or correctness. Can Congress legislate into a *mere preliminary decision* of a *mere ministerial officer* such a conclusive force and effect? Can they go further than this, and give to it this conclusive character, only in case the decision shall favor the claimant? Have they a right to conclude one and not both of the parties? Most surely, the Constitution did not intend, that the tribunal, which has power to bind and hold, should not have power to release and discharge; and they fixed the character of the court, when, by forbidding it to discharge those who were held to service or labor in another State, they implied in it the power to discharge those that were not so held.

The next fact worthy of our attention, is the well settled fact of the right of recaption, with some of its incidental consequences. Suppose now, an attempt on the part of the master, without any legal process, to capture one whom he claims as a fugitive slave, and that this attempt is met with resistance, interference, ends in failure or rescue, or is only accomplished with severe wounds or injury to either or both

parties; or suppose that, after the capture, the captive is taken from the possession of the master, by the service of the writ *de homine replegiando.* Now, from these contingencies, there may spring, it is seen at once, numerous suits, each to be tried within the State where the captive is found, whether the action be brought in the State or the United States Court; and in each of these suits, the question whether the alleged fugitive was legally the slave of the captor, might be put in issue by the pleadings, and would go as a question of fact to the jury. Nor is it essentially different in an incidental case arising under the provisions of the Act of 1850. In the trial of the persons indicted for the rescue of Shadrach, a captive under this Act, Judge Sprague instructs the jury, that, of sixteen counts in the indictment, thirteen will fail, unless the jury shall find, from the evidence before them, that Shadrach was the slave of Debree. The other three are not under the provisions of the Act of 1850, but under the provisions of the law of 1790, and are not for rescuing a fugitive from service, but for rescuing a person legally held by the officers of the law, or for obstructing, resisting or opposing the service or execution of legal process. As far as the action rests upon the statute of 1850, so far it puts in issue to the jury the question of bond or free. Now, if the master proceed to recapture, the alleged fugitive may put himself in a position to have his rights determined by a jury and a Judge; and, if he proceed in any way, the rights of all third parties will be thus determined. But the statute of 1850, which prescribes the legal proceedings under this clause of the Constitution, deprives him of this privilege.

Is not this anomalous legislation, which gives a full trial to third parties and strangers, and no trial at all to principals? If there be such a right as that of recaption, cannot the alleged fugitive claim all the legal privileges it would

give him? Shall legal process be provided for the master, so that he may evade legal examination? Here, it is seen that this clause of the Constitution, which, the Supreme Court have declared, "may properly be said to execute itself,"* when it operated by its own vigor, unrestricted by legislation, left the ascertaining of the rights of the parties to the due process of law. Not a single right could the master enforce by the strong arm of the law, without the verdict of a jury and the judgment of a Court. Had the Acts of Congress left this matter, in this essential respect, as they found it, fugitives would peaceably have a judicial investigation of that question, which now can only be brought before a court, by harboring or concealing, or by resistance contrary to the form of the statue. Is it not worse than idle, to say that the intent of the Constitution is, that there should be no due process of law for fugitives from service, when, wherever and however we may approach this matter under the Constitution, instead of under the statutes; whenever we can get at general principles of law, and away from the express prohibitions of the statute; then, we find the presence of a Judge and a jury as a thing of course?

But we are not left merely to infer, though irresistibly, from even undisputed *dicta*, or to gather as the inevitable consequence of established proceedings, that the Constitution contemplates other than a mere ministerial inquiry. There is a deliberate decision of the national Supreme Court, that cannot be reconciled with this "preliminary" hypothesis. The following is the passage:—

"It is plain, then, that, where a claim is made by the owner, out of possession, for the delivery of a slave, it must be made, if at all, against some other person; and inasmuch as the right is a right of property capable of being recognised and asserted by proceedings before a Court of Justice, between parties adverse to each other, it constitutes in the strictest sense, a

* 16 Peters, 613.

controversy between the parties, and a case 'arising under the Constitution of the United States, within the express delegation of judicial power given by that instrument."*

The "judicial power" within which it is thus brought, the Constitution provides, shall be vested in courts whose judges shall be judicial officers, such as Commissioners are not:† and as it is not a case in equity, nor of admiralty and maritime jurisdiction, it is a case in law, and "a suit at common law,"‡ where the right of trial by jury must be preserved.

Judge Sprague, in his charge to the jury, in the "rescue

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* 16 Peters, 618.

† Art. III., Sec. I.

‡ Amendments, Art. VII, also Parsons *v.* Bedford, et. al, 3 Peters, 433, 446-7.

That, in the case between the claimant and the claimed fugitive, "the value in controversy exceed twenty dollars." See Lee *v.* Lee, 8 Peters, 44-48.

The statements of the above paragraph are not among the disputed points in the discussion of this statute. They have been placed beyond controversy by others who have argued this question before me. I have seen them maintained in the following efforts: a Speech of Jabez C. Woodman, Esq., of Portland, made at a Convention at Winthrop, January, 1851, and published in the Portland Inquirer of February 20; a Speech of Hon. Horace Mann, delivered in the House of Repretentatives of the United States, February 28, 1851, and published among his "Letters and Speeches," p. 390, and the Opening Argument of Hon. Robert Rantoul, Jr., in "The Trial of Thomas Sims," at Boston, April 7, 1851. Neither Commissioner Curtis nor Judge Sprague specifically considered these points, nor attempted any answer to them, unless their own choice to call the proceeding preliminary be deemed an answer. It was only necessary that it should be stated here, in order to connect the parts of this essay. They have been established by others; and so far, at least, in spite of all obstacles, have the opponents of this statute succeeded in carrying forward their argument.

Other points in this essay are original with others; but after so many different persons have stated their objections to the constitutionality of this statute, it is difficult to say with whom in particular, they originated. I hope I am wronging no one by making, merely, a general acknowledgement.—*Ante*, 42.

cases," says that the remark above quoted "was an *obiter dictum*, and can only be reconciled with what was deliberately decided in the same case, by supposing that the judge who delivered the opinion, intended that Congress might legislate for it as within the judicial power, and provide for its being tried by a Court, and not that they must do so." It is hard to see the soundness of the modification here suggested. If this be a "case arising under the Constitution," as the Court say it is, "in the strictest sense;" then, if Congress legislate upon it at all, they must legislate upon it *as such*. If it is not such a case, then, it is without the constitutional extent of the judicial power, and Congress cannot, by legislation, bring it within. This reasoning of the Judge of the District Court rests upon a principle of constitutional interpretation, which, I think, has never before been recognized as correct, namely: that the limits of the "judicial power" are not fixed in the Constitution, but depend upon the will of Congress.

Commissioner Curtis indulges the same delusion. He grasps this process, with joy that it is within the judicial power, of which he deems himself an humble minister; but forgets what brings it within the scope of this "power." If it be within the judicial power, it is so, because it is one of the cases named in the Second Section of the Third Article of the Constitution. Can Commissioner Curtis say that it is a case, arising under a Treaty; affecting Ambassadors; of admiralty and maritime jurisdiction; a controversy to which the United States is a party, or between two or more States, or a State and citizens of another State, or citizens of different States, or citizens of the same State, claiming lands under grants of different States, or between a State or the citizens thereof, and foreign States, citizens or subjects? If it is neither of these; then, it is a Case in Law or Equity, arising under the Constitution and the Laws of the United

States; or else, it is without the constitutional limits of the judicial power. Whichever of these it is, the method of its trial prescribed by the Act of Congress under consideration, is plainly unconstitutional. No other case, mentioned in that Section, is similarly disposed of.

But, it is said, Congress may, within certain limits, parcel out the judicial power, as may best subserve the speedy administration of justice. What follows? What are those limits? In order to bring a case or a person before the United States Courts, the Commissioners appointed by the Circuit Courts, may take certain preliminary steps, or during the trial of such a case, before the same tribunals, they may perform certain assisting and ministerial functions. This is all. They can do no more. The certificate, that a person owes service or labor in another State and has escaped therefrom, is not given for the purpose of carrying the fugitive before the United States Courts, for trial, nor during such trial, as an ancillary act to forward its progress. It is, accordingly, without the line of their ordinary offices, and beyond any analogy which may be drawn from them.

That Congress might authorize a Commissioner to imprison or bind over an alleged fugitive for trial in the United States Courts; and that this would be a preliminary and ministerial act, is perfectly plain. But the tribunals administering an Act of Congress, are to inquire, not what Congress may do, but what Congress has done. Has Congress parcelled out this case which is within the judicial power, in such a manner as to justify the present summary proceedings? Where is a final adjudication provided for? Where is it to be had? Without looking, at all, at the facts of the case: simply considering the statements of the tribunals who sustain and enforce this statute, here is the insuperable difficulty, in the way of their explanation. They talk about a part, and can tell of no whole. They plunge with Niagara, and

insist that they stop half way down. But it may be asked, can not Congress provide, that, under their statute, the investigation should be commenced, and that, thereupon, the fugitive should be delivered to the jurisdiction of the Courts of the State, whence, according to *prima facie* evidence, he fled, for a full trial of his rights and liabilities. Suppose this could be done: the important question, then is, has it been so provided? Is such the law? But this cannot be done. The Constitution forbids it. That instrument provides, that fugitives from service shall be delivered to those to whom their service is due, to their masters; and a delivery to the master, is one thing, and a delivery to the jurisdiction of a Court, is another thing, and altogether different. Moreover, to commit any portion of this delivery, and much more to commit the final and judicial part of the process to the Courts of a State, is to transfer the judicial power of the United States, from tribunals where the Constitution has vested it, to unconstitutional hands. This delivery is declared to devolve upon the general government; and its lawful agencies must perform it, the whole of it, leaving not a jot or tittle to other instrumentalities, or to the contingencies of chance.

It is true that this opinion cannot be reconciled with that in favor of the constitutionality of the Act of 1793; and, of the two, the latter is clearly the *obiter dictum.* The latter, as has before been shown, was not a conclusion which the Court aimed at and reached, deliberately; nor was it an opinion they were compelled to adopt in their process of investigation, in order to reach such a conclusion; it was an entirely superfluous step beyond such a conclusion.* On the other hand, the opinion that the claim of a "party to whom service or labor is due," constitutes a "case arising

* See 16 Peters, 622, and preceding.

under the Constitution," furnished the ground upon which they based their deliberate conclusion, that Congress had power to legislate for the execution of this clause of the Constitution: one of the chief conclusions of the case; and one, without which the Act of 1850, or in fact, any similar act falls at once. This opinion can be reconciled with all that was deliberately decided in that case, while the other opinion, to which Judge Sprague clings so tenaciously, cannot be reconciled with the elementary definition of the right guarantied by the Constitution.* It would probably never have occurred to the mind of any Court called upon to examine and apply the principles laid down in the Prigg case, that this opinion was a mere *obiter dictum*, were it not for an overruling desire, on the part of the tribunals, to lay hold of an expression of the Court in the same case, which was an *obiter dictum*, "a pure and simple" *obiter dictum*, and to make this *dictum* the ruling and only ruling principle of the case. It is the assumed constitutionality of the Act of 1793 which makes that decision

"turn away
And lose the name of action."

It is this partial observation, taken by the Exploring Expedition, that wrecks all the mariners that attempt blindly to follow its chart.

It is worthy of remark, that Judge Sprague's charge was given after Commissioner Curtis's opinion, and that this passage in the opinion of the Supreme Court perplexed the Commissioner. He admitted that the "claim for a fugitive," was within the judicial power: that position was necessary to his purpose. But he ignored the main part of the passage, that it is "a case arising under the Constitution." Not an American officer, whose duty he attempted to make analo-

* See Commissioner Curtis's Opinion, and Judge Sprague's Charge.

gous to his own task, pretends to decide "a case arising under the Constitution;" and so, his arduous analogy brings him no support. Afterwards, upon more mature deliberation, the Judge felt compelled to overrule and set aside the whole passage as an "*obiter dictum.*"

It is not the only attack, which must be made upon the decisions as well as the reasoning of the Court, in this leading case, if the Act of 1850 is to be sustained against the arguments that have been, and may be, made against its constitutionality. This remark of Judge Sprague cannot itself be sustained, without overruling what the Court had, earlier in their opinion, advisedly determined. The Court have not merely declared that this is a "case arising under the Constitution; "but they have also defined its character which makes it such. Will Judge Sprague reject their definition? Will he say that the right of the claimants in these cases is not "a right of *property*, capable of being recognized and asserted by proceedings before a *Court of Justice*, between parties adverse to each other," and guarantied by the Constitution? Until he does this, it is hardly competent for him to deny that it "constitutes, in the strictest sense," "a case arising under the Constitution;" for, the conclusion is not a departure from the direct line of severe logic, but the natural and necessary result of the previous reasoning. But the exigencies of the case in other relations demand all this boldness. While the interpretation of the right guarantied by this clause of the Constitution, fixed by the Supreme Court, is permitted to stand as sound law; not only does the claim constitute "a case arising under the Constitution," but also, there is no resting place, not even the shadow of a foundation for the doctrine of a *limited right of removal*, without which, the Act of 1850 would itself soon have to remove.

If, now, there be any legal force in the meaning of the

word "discharged:" if the Courts, in their reasoning upon this subject, have understood their own words: if an absolute delivery, requiring proof of ownership, be intended by the Constitution; and, accordingly, the case between the claimants and the claimed, is, as the Supreme Court have declared it to be, "a case arising under the Constitution;" then, it must be tried as such: the Acts of 1793 and 1850 are palpably and clearly unconstitutional, in their provisions, or rather, their want of provision for such a trial; and there can be no constitutional surrender of a fugitive from service, without a full trial by due process of law, in the presence of a judge and by a regularly empannelled jury.

Indeed, how clearly is the whole law upon this matter, stated in the judicial language, which stands as the motto of this division of this essay! Proof of ownership—of course, then, upon trial—precedes the delivery, and the right of removal merely follows and flows from it.

PART THIRD.

The Difference between the Extradition of Persons Charged with Crime, and the Delivery of Persons Held to Service or Labor.

"Individuals on each side CLAIMED the PROPERTY; and, therefore, their rights could be brought into Court. and there contested as a case in law or equity. The demand of a man made by A NATION stands on different principles."

"The case was, in its nature, a national demand made upon the nation. The parties were the two nations. They cannot come into Court to litigate their claim, nor can a Court decide on them. Of consequence, the demand is not A CASE FOR JUDICIAL COGNIZANCE."—*Argument of John Marshall, afterwards Chief Justice of the United States, in the case of Jonathan Robbins, in the House of Representatives of Congress, March* 7, 1800. *See Annals of Congress*, 1799–1801, 613, 596.

It is useless to attempt to conceal the inference that necessarily arises from the view advocated in these pages, in connection with the fact, that the same objections might be made against the Act of 1793, namely: that, in reference to fugitives from service, Congress was inaccurate in its legislation, as early as 1793, within four years after the organization of the government under the Constitution. What facts can be found to sustain this presumption?

Here are two clauses of the Constitution, found in juxtaposition, and somewhat similar in appearance. A difficulty early arises between two States, in relation to the execution of the first part of these two clauses, that providing for the rendition of fugitives from justice; and Washington, then President, laid the correspondence before Congress, that that body might regulate the execution of that provision of the Constitution. Congress took up the subject, and legislated both clauses into one Act. Such a method of legislation opens a wide door for inaccuracy and error. If we find mistakes in statutes so enacted, we need not be startled or surprised: their entrance is easily accounted for.

But we are not left without positive proof, that Congress, very early, confounded these two clauses of the Constitution together. Between the Act of 1793 and that of 1850, there is another act, or rather section of an act, in relation to fugitives from service, found in the District of Columbia. An Act, approved March 3, 1801, concerning the District of Columbia, contains the following as its 6th Section:—

"§ 6. That in all cases, where the Constitution or laws of the United States provide that criminals and fugitives from justice, or persons held to labor in any State, escaping into another State, shall be delivered up, the Chief Justice of the said district shall be, and he is, hereby, empowered and required to cause to be apprehended and delivered up such criminal, fugitive from justice, or persons fleeing from service, as the case may be, who shall be found within the district, *in the same manner and under the same regulations as the executive authority of the several States are required to do the same*; and all executive and judicial officers are hereby required to obey all lawful precepts or other process issued for that purpose, and to be aiding and abetting in such delivery."

It will be seen that all jurisdiction over persons fleeing from service, found within the District of Columbia, is granted to the Chief Justice of said District; and he is to cause them to be delivered up in the same manner as the executive authority of the several States are required and empowered to do the same; and as the executive authority

of the several States, neither by the Constitution, nor by the Acts of 1793 or 1850, are empowered to deliver up fugitives from service, in any manner, the Chief Justice of said District is not empowered or required to do it all; and that Act of Congress, so far as it relates to fugitives from service, found within the District of Columbia, is entirely inoperative.

Here, then, we have the fact, that the Congress of 1801, in its legislation upon this matter, not only confounded together two separate clauses of the Constitution, but overlooked the fact, that the Act of 1793 had made different provisions for the delivery of two classes of fugitives, and assumed that its provisions in relation to both classes, were entirely analogous; and upon this assumption, framed a piece of legislation in such a manner as to give no force to its provisions for the delivery of fugitives from service. Whatever remarks may have been made by the courts, or those contending for the constitutionality of the Acts of 1793 and 1850, in relation to the superior political wisdom, the thorough acquaintance with the provisions of the Constitution, the almost unerring understanding of its intent, which was embodied in the Congress of 1793, must apply, with some force, to the Congress of 1801. Some of the wisdom, which illustrated the period from Eighty-six to Ninety-three, must have survived the last century; it cannot all have died out in eight years. If then, we actually find gross inaccuracy in the legislation of 1801, we shall hardly be presumptuous, if, upon critical examination, we conclude that we have discovered the same in that of 1793. If the Congress of 1801, with eight years of added observation and experience of the working of the Constitution, with those two clauses commented upon, and to a certain extent, kept distinct by the Act of 1793, shall have confounded them together, and not only them, but also the

entirely dissimilar provision of the Act of '93, it is not at all improbable that the Congress of '93, without any such comment, should have fallen, though not so deeply, into the same error. Nay more, this confusion which existed in 1801, must have had an origin; and as there was no legislation upon the subject between the two periods, it is most easily accounted for by supposing its existence, as early as 1793.

But, fortunately, there is no need of labored effort to prove, that there has been such a confusion of these two clauses, as is here asserted. This confusion is a fact, which appears in every discussion of this subject. It is even to be found in the opinions of the Supreme Court. Judge Story, in giving the opinion of that tribunal, in the case before quoted, remarks, "There are two clauses in the Constitution upon the subject of fugitives, which stand in juxtaposition with each other, and have been thought mutually to illustrate each other," and then proceeds to point out the two clauses now under consideration. An ingenious commentator upon this remark, acting under the authority of the Act of 1850, and endeavoring to establish its constitutionality, says, "Let me ask, by whom they have been so supposed? Manifestly by the Congress, who enacted the law of 1793, which provided for carrying both these clauses into effect, in the same statute;"* thus arriving at the same conclusion in regard to the Congress of 1793, to which this investigation has led us, namely: that they deemed these two clauses *essentially analogous*. Story's Commentaries on this portion of the Constitution proceed from this presumed analogy. Judge Sprague's charge to the jury is based upon the essential identity of these two clauses, and Commissioner Curtis's opinion has the same foundation. All the arguments in favor

* Trial of Thomas Sims, 42.

of the constitutionality of the Act of 1850, assume its existence. The friends of this statute cannot bring to bear the first piece of their logical artillery, without showing that their whole science of gunnery rests upon this assumption. The confounding together of these two clauses, is one of the facts of the case; it appears from the pleadings, not simply as having existed in the Congress of 1793, but as existing ever since, and now prevalent, not only in the halls of Congress, but also in the courts of justice, and having fast hold of the public mind. It must be recognised in this essay; and it leads us to the next step in the argument, viz: to show that it is unfounded.

If it has been shown that the second of these clauses requires an absolute delivery, by virtue of the right of property; then, while it is known that the other requires a delivery for a specific purpose connected with the administration of justice, there is little need of further analysis to show that the two are not essentially alike. It cannot be amiss, however, even at the expense of repeating what has been written in other connections, to approach the question of their analogy, as though nothing touching it had preceded. Laying, therefore, these two clauses of the American Constitution, yard arm and yard arm, let us board them both. Let us examine their papers, and see if, though, perhaps not of a different national character, and sailing under different flags, they are not afloat on the ocean of legislation, with altogether different powers and purposes.

The words of one are:—

"A person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up TO BE REMOVED to the State having jurisdiction of the crime."*

* Art. IV., Sect. 2, Second Clause.

Those of the other are:—

"No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but thall be DELIVERED UP, on claim of the party to whom such service or labor may be due."*

It has been contended, and apparently, with a great deal of force, that there was a material difference in the words used to describe the subjects of these two clauses: that the facts of being "charged with crime," and of being "held to service or labor," are in law essentially different; that they differ not only as crime differs from contract, but that the word "charged" denotes a relation to "crime," different from that which the word "held" denotes to "service;" that these words denote legal facts which belong to two distinct classes, widely different in their legal character and consequences. It has been urged that being "charged with crime" is a preliminary fact; that is, preliminary to further legal investigation: that, if it were judicially established by due process of law, finally and irreversibly settled, after the fullest trial, that a person is "charged with crime"—that this fact would only subject him to this necessity, the necessity of undergoing a trial to establish his guilt or innocence, with the preliminary incidents to such trial. But that, on the contrary, the fact of being "held to service or labor" is a final fact; that is, as soon as this fact is established, there must be an end to legal proceedings; that, when it is judicially decided that a person is held to service or labor, or what is equivalent, owes service or labor to another; the legal consequence follows, that he must yield such service or labor to that other, and that, in some form, an execution must issue to compel the performance of that service, or to give the master the power to exact it. This distinction ap-

* Art. IV., Sec. 2, Third Clause.

pears to be real; it seems also to carry with it important legal consequences; but the courts and officers to whom it has been addressed, have failed to perceive it; and what some of the ablest members of the bar, in our country, have in vain attempted to make plain, it is useless for me, to try to illustrate and enforce.

There is another difference between these two clauses, which has not yet been so fully brought before the courts, which, possibly, they may not ignore. Perhaps, both differences taken together may do away with the idea, that these clauses are essentially analogous. Turning from the subjects of these two clauses, let us, for a moment, look at their predicates. We find that persons "charged with crime," are to "be delivered up TO BE REMOVED TO THE STATE *having jurisdiction of the crime*," or what is in fact the same, "to the State from which they may have escaped or fled." They are delivered for "the special and limited purpose" "of removal." To the State demanding them, is secured the right of removal, the limited, ministerial right; *ministerial*, because the character, in which they are demanded and surrendered, is such as necessarily to imply that they are removed for the purpose of a trial by due process of law.

On the other hand, persons "held to service or labor" are to be DELIVERED UP: without qualification or restriction: simply *delivered* up "on claim of the party to whom such labor or service is due:" for no "special or limited purpose" whatever: delivered as "owing service or labor," to the master; and the character in which they are claimed, necessarily implies that they are delivered up, in order that the master may have power to exact such service at their hands.

Nay, more, the difference in the phraseology of these two clauses, is based upon the fact, that, while the question of

crime can properly, and by the Constitution,* be tried only within the jurisdiction where the offence has been committed; the question of service or labor under the laws of a particular State, may be tried anywhere; and the purpose of this difference is, that the fugitive from justice shall be sent back to the State having jurisdiction of the crime, FOR TRIAL, while the fugitive from service, must, first, have a trial, and then, be DELIVERED UP to the party to whom he owes service, in order that he may EXACT LABOR at his hands.

There lie the two clauses of the Constitution. Side by side, it is true; in juxtaposition and under the same article, no one will deny. But they are not one and the same clause. The one contains words of limitation which the other has not; and unless we disregard that established rule of legal interpretation, that all the words of an instrument are to be considered as having meaning and force; unless important words, significant enough to change the whole character of the legal proceedings under these clauses, unless such words found in one clause, and not to be found in the other; expressed in one, and omitted in the other, are to be deemed and treated as though they were in both; the two clauses cannot be considered as essentially analogous. In the first clause, there are words which limit the delivery to the purpose of removal. In the second, are no such restricting words; and unless we transfer from the first, the words which limit the delivery, and insert them in the second (with the necessary variation in the adjunct), so that the second clause shall read, "shall be delivered up on claim of the party to whom such service or labor may be due," "TO BE REMOVED *to the State or territory whence such persons may have escaped or fled;*" the two clauses will remain essen-

* Amendments, Art. VI.

tially different; different not only, as has been contended, in the class of persons upon whom each is to operate, but different also, in their operation, in the disposition of these persons, in what the Constitution directs shall be done with them.

The ideas of an analogy between these two clauses, and of a limited right of removal, seem twin to each other, mutually dependent and supporting; both must fall together. Commissioner Curtis, in the case of Thomas Sims, used the following language: "the right secured by the Constitution — namely, the right of removal." He is a man somewhat learned in the law, and has, undoubtedly, read the Constitution of the United States. Can he point out the portion of that instrument, which "secures" to masters of fugitives from service, the right of removal? The Article and Section? Fugitives from justice are to be removed, and the State demanding them, has the right to remove them. But there is no such provision in regard to fugitives from service. As the Constitution now stands, the idea and conception, the refuge, screen and hiding place of a limited right of removal of fugitives from service, is swept away, and the two clauses still remain, as they ever have been, essentially distinct.

So wide, indeed, is the difference between them, that one who assumes their essential similarity, will hardly give the characteristics of either, with any thing like legal accuracy. Mr. Justice Story, in his Commentaries on the Constitution, treating these two clauses as analogous, says of the first:—

"All that would in such cases seem to be necessary, is, that there should be *prima facie* evidence before the executive authority to satisfy its judgment that there is probable cause to believe the party guilty, such as, upon an ordinary warrant, would justify his commitment for trial."*

* Story's Commentaries, Book III., Chap. XL., 677.

This is a statement of one side of this far famed analogy; and coming from such an authority, it is not lightly to be doubted. But, with the statute before him, upon the same subject, one may venture to say, that such is not its provision, and that the Act of Congress of 1793, within four years from the adoption of the Constitution, is, of the two, the better authority. Its Frst Section points out the duty of the "executive authority," in the following words:—

"Whenever the executive authority of any State in the Union, or of either of the territories Northwest or South of the river Ohio, shall demand any person as a fugitive from justice, of the executive authority of any such State or Territory to which such person shall have fled, and shall moreover produce the copy of an indictment found, or an affidavit made before a magistrate of any such State or Territory as aforesaid, charging the person so demanded, with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged, fled, it shall be the duty of the executive authority of the State or Territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

It will be seen, at once, that this Act does not leave this duty to the discretion of the executive authority. He is not required to examine witnesses, and if there be *prima facie* evidence of guilt, to cause the surrender, and otherwise, not to do so. He is not to weigh the probability of his guilt. So far from weighing that question, as a magistrate would, prior to committing for trial, the executive does not consider it at all; does not even have the party before him. Not only has the learned author apparently misstated the object of the evidence; but also, the amount required does not answer his description, "such as upon an ordinary warrant would justify his commitment for trial." An affidavit made before a magistrate will not authorize a commitment for trial. There must be an examination of the party, and the hearing

of testimony, neither of which are to be found in this proceeding. The amount of evidence of guilt required, if the Governor were allowed to weigh it at all, would be that, which would authorize a magistrate, not to commit for trial, but to issue a warrant for arrest in order to an examination, which would precede a commitment for trial. He is not even required, absolutely, to determine the identity of the party; and from the nature of the proceeding, he cannot, absolutely, determine even this fact; for he does not (so to describe it) point out to the sheriff a certain individual among others, or give him a description of his person, so that the officer may everywhere recognize, and safely take him, whatever may be his name. But he issues his warrant directing the officer to arrest the man therein named, the person named in the papers forwarded to him; and the officer must identify the person at his peril.

But what fact, then, has the executive, in such cases, to ascertain, and to prove what, are any papers laid before him, in the premises? If we keep in our minds the words of the Constitution, we shall, perhaps, get an answer. Let us recollect that, in order to bring a person within the operation of this clause, he must be, not guilty, nor probably guilty, only, charged with crime, yet still, positively charged. The Constitution puts into the case no such important fact as guilt. It puts in a less important fact, easily ascertained, beyond controversy; and then, requires this fact to be positively proved. A distinction as to the purpose for which documentary evidence may be produced, is also in point here. A document may be introduced as evidence to prove the facts therein stated, or merely to prove that there is such a document, to prove its own existence as a separate fact.

Now, to which of these two classes do the documents brought before the executive authority of a State, accompanying a demand for the delivery of a fugitive from justice,

belong? If the Constitution described a fugitive from justice as a person guilty of crime, or probably guilty, and these papers should then be used, we might say, they were introduced to establish the fact therein stated, the guilt or probable guilt of the party. Then, they would be *prima facie* evidence, and of a very poor kind. But the Constitution has a different phraseology: its clause describes a fugitive from justice as a person charged with crime; and these documents are introduced to prove that fact. Now, an indictment is itself a charge: an affidavit before a magistrate is a charge; is so considered by the statute. Having, then, before him, an authentic copy of these documents, the executive authority acts, not so much from proof of the fact as testified to by others, certainly, not from any *prima facie* evidence, but from evidence of the highest character; the papers being authenticated, from the presence of the fact itself, from the knowledge of the charge, with his own senses. The fact does not depend at all upon the character or correctness of the witnesses, but simply, upon the truth of the copy. Did the clerk make a true transcript? If so (and this is proved by the governor's certificate), then, there is, most certainly, a charge of crime; and the delivery must be made.*

If, then, the operation of the law of 1793, has been correctly stated, it will be seen that there is no examination whatever by the executive authority, into the question of the party's guilt; that evidence of guilt, equal to what would be sufficient to authorize a commitment for trial, is not required; that *prima facie* evidence of guilt is not before him; that *prima facie* evidence of any kind is not admitted in the proceedings. The only fact to be proved, is, that the party is charged with crime; and that fact is proved by a copy of the charge itself. Only, by forgetting the phraseology of the Constitu-

* See Appendix, I., with reference to the Executive practice under this Clause and Act.

tion, by keeping clear of the provisions of the Act of 1793, and overlooking the difference between the two purposes for which documentary evidence may be introduced, can this definition of executive duty under the clause relating to fugitives from justice, be sustained. Otherwise, it is seen to be entirely inaccurate, and with it, falls the chief foundation for the analogy, which individuals and courts have attempted to establish between proceedings in the case of a fugitive from justice, and proceedings in the case of a fugitive from service. Upon Judge Story's basis, builds, with others, the architect of our day, Commissioner Curtis, his structure of the Order of 1850; builds, and deems his house secure; but beneath comes the treacherous Act of 1793, and steals away the foundation.

In this connection, let me quote another specimen of reasoning from the case of fugitives of one class, to the case of fugitives of the other class.

"Suppose, the law had required only, that the certificate should state, that the fugitive was *alleged or charged* to owe service; would that have changed the legal character of the inquiry? It would have made the law more objectionable, but not have rendered the proceeding more summary."*

Did Judge Sprague really say this and the corresponding sentence which will soon follow, or has a malicious reporter put it into his mouth, to bring his opinion into contempt? Most certainly, that change of the phraseology would change the whole nature of the proceedings, and indeed, require a reconstruction of the clause. Suppose it were proved, and judicially established, that one person is *charged* (though that is hardly the word appropriate to this connection) is *alleged or claimed* to owe service or labor to another. What follows as the legal consequence from this fact? Not that he must render service or labor,

* See Judge Sprague's Charge. I have followed the report in the Morning Commonwealth of June 6, 1851.

for it has not yet been ascertained, that any such service is due. There could, in such a case, be no delivery to the party to whom such service or labor is due, for that party has not been ascertained. But it would follow, that there must be a trial to test the truth of the charge, to inquire into the correctness of the allegation, to ascertain the validity of the claim. Then, the decision would not touch the ultimate rights of the parties; and we might properly use language, which is now misapplied to proceedings under the Act of 1850. We might call it a "preliminary examination," and we might talk of a *further and final investigation*, and perhaps, name a "limited right of removal;" for the relation of the parties would necessarily imply such a trial, and the papers in the case would be likely, in some way or other, to recognise it, and we should know what the purpose of the removal was; all of which things are now hid from us.

The next sentence, which the reporter has given us, as from Judge Sprague, is:—

"Suppose, that a treaty, instead of saying that a person *charged*, should say that a person *guilty* of a crime in a foreign country, should be delivered up."*

This alteration would also affect the character of the proceedings; and as the change first suggested would do much towards suiting the relation of the parties and the question to be ascertained, to the summary proceedings under the Act of 1850 (not taking from them their summary character, but yet, removing the objections to that character); so would this change entirely unfit the character of the party and the question to be ascertained, to the mode of proceeding, at present followed with regard to fugitives from justice. It is submitted, that no President would attempt to execute such a treaty; that no governor of a State would venture to send

* See Judge Sprague's Charge.

back fugitives from justice, under a clause so framed. Each would say: Before this party is given up, his guilt must be established. To determine the guilt or innocence of a person, does not belong to my office, and to send a person away from the State, as *guilty*, with the stigma of guilt fastened upon him, as legally answering to the description, "guilty," and of course, delivered to the natural consequence of guilt, which is punishment; to deliver a person up thus, without having fully heard and tried his case, would be a usurpation, greater and more unjust even, than unlawfully to leave the executive chair, and take my seat upon the judicial bench, and attempt to discharge the functions which the Constitution has forbidden me to touch. If you have brought with you, the record of a conviction after a trial according to your forms of law, the accused then being in your jurisdiction, and present at the trial, I can authorise his surrender. Otherwise, as there is no Court here, having jurisdiction of the offence, and the party cannot here be tried; if guilty, he must go unpunished, and the treaty must fail to be executed.*

Yet, severe and summary as such proceedings would be, in regard to "crime," so summary, that such a clause in a treaty or Constitution could not be executed, save upon convicts, they are no more summary than the proceedings prescribed by the Act of 1850, in regard to "service or labor," and the tribunals clothed with power under this Act, would

* The system of law is not illogical or disjointed. It does not require facts to be judicially established, without purpose. It attaches to each fact its proper consequence. Now, the only consistent purpose of proving the fact of guilt, and its only proper consequence is punishment; and, in his argument in the case of Jonathan Robbins, Chief Justice Marshall, expressly declares, that, where a treaty "instead of stipulating to deliver up an offender, should stipulate his punishment, provided the case was punishable by the laws and in the Courts of the United States;" that would be "a case in law or equity, proper for judicial decision." — *Annals of Congress*, 1799–

do well to imitate the moderation, which, without doubt, would characterise the executive authorities of our States or nation, under analogous circumstances.

Let me notice one more attempt to unite in matrimonial bonds these two clauses, in order that their issue may be made legitimate, one more essay to justify unconstitutional legislation, by assuming a similarity which does not exist.

"In both cases, the Government of the United States surrenders the fugitive, or provides for his surrender, to the party to whom it has stipulated, that he shall be delivered up. That party, in the one case, is *the owner who claims a right to hold* the fugitive after he has received him. In the other, it is the *State which claims to hold and punish* the fugitive after it has received him."*

Without a trial in both cases? Which State claims any right to hold and punish a fugitive after it has received him, without giving him a fair trial by due process of law? Let us hear nothing about "*stipulations!*" "*Claims*" is the word. Which State *claims* this despotic prerogative? Against which of the States does this base accusation lie? Name her, that the other thirty may avoid her bad faith! Point her out, that the traitor to honor may be blotted from the list of fair dealing sovereignties! Not one of the States that face the Atlantic, or line the Gulf, not one of those that border the Northern Lakes, or between whom there is a channel grooved for the mighty Mississippi, nor that one, that alone looks from her golden hills, out upon the

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'801, 607. The right of the fugitive to be tried before he is punished, hich no civilised government would deny, would be the same, whether his punishment should take place in the country where he is found, or in that to which he is to be carried; and it is because he has this right, and because he can not properly be tried, save where the crime is alleged to have been committed, that treaties provide for the delivery of *persons* "*charged with crime;*" using words of description, which, necessarily, imply *a trial as the object of delivery.*

* Trial of Thomas Sims, 43.

broad Pacific, makes such claim. Of this Union, which stretches, like a zone, across the continent, whose people nature and providence mean indissolubly to knit together, and which nothing but a gigantic crime threatens to dissolve, but which, in a few years, will tread that crime under foot, and move on to bless mankind, for ages; of this Union, not a member is guilty of such an outrage upon state comity and personal rights. Not a State, nor a Territory that hopes to be a State, claims to hold and punish a fugitive, without due trial; and not a master pursues a fugitive, that does not make such claim with his entrance into Court. The State claims only to hold her fugitive for trial, and to punish him, if found guilty; not otherwise. By omitting this distinction, which was essential to the truth of the sentences, an appearance of analogy between the two cases may be raised. But what kind of analogy is that, the words used to support which, have no force without a lie understood?

The fact, that the question, whether a person be held to service or labor, or not, enters into the issue, in the trial of all the actions that may incidentally arise under the Acts of 1850 and 1793, and under the Constitution, has a phase which throws light on this question of the analogy between "the two clauses of the Constitution which are supposed, mutually to illustrate each other." Let us put by the side of the fact, which has been stated in regard to trials under one clause, the opposite fact, that in no trial, which may arise under the other clause, can the guilt or innocence of the party charged with crime, be put in issue. If a person be arraigned and on trial for forcibly setting at liberty, or rescuing the fugitive from justice, he cannot show that the fugitive was not *guilty* of the crime charged, and therefore, not within that provision of the Constitution, or the Act which regulates its execution. The person rescued is not

named, either in the Constitution, or in the statute, as guilty, and cannot be described in the indictment as guilty. The question of his guilt or innocence cannot, possibly, be brought before the Court; and not a single count in the indictment, not even those under the Act of 1793, can be made to depend upon the fact of his guilt or innocence.

Now, if there be this essential analogy between these two clauses, which has been supposed to exist, how happens it that, when carried out into legislative enactments, they exhibit so striking a contrast? If there is no essential difference in the description of the subjects of these two clauses, if the word "charged" denotes the same relation to "crime," that the word "held" denotes to "service or labor;" if "crime" and "service," guilt and obligation are terms in these clauses, strictly correlative, why does it not appear in the proceedings? Why is government not compelled to prove the *guilt* of a party rescued from the agent of a State, under the Second Section of the Act of 1793, and compelled to prove the service of a man rescued from the marshal or owner, or else, fail to convict the rescuers, under the Fourth Section of that Act, or under the Act of 1850? Why do thirteen counts of the indictment against the persons now awaiting their trial for a rescue, in Boston, fail, unless it be proved that Shadrach was the slave of Debree: and at the same time, an indictment for the rescue of a fugitive from justice, cannot be framed so as to put in issue the question of his guilt? I know, that analogies do not always keep step; and the theologians tell us that parables ought not to be made to go upon all fours. But parables ought to touch the ground somewhere, and things analogous ought to have the same motion. But these two clauses do not even this: in the words of the old hymn, they "neither fly nor go" together.

It is well known that an article stipulating for the same

general object as the first of these two constitutional clauses, is often to be found in international treaties. The surrender of fugitives from justice, has been a matter of stipulation between this country and Great Britain, ever since Jay's treaty of 1794. It is also well known that that subject was, early in the history of our government, searchingly and thoroughly discussed in our national House of Representatives; and that the speech of Mr. Marshall of Virginia, afterwards Chief Justice of the United States, made during this discussion, contained a statement of the nature and object of that article in the treaty, so clear; and showed to which division of governmental powers and duties that matter belonged, and upon which department of the government, the execution of that stipulation devolved, so satisfactorily, that it has since been received as a correct exposition of the Constitution upon that subject; and has been regarded as of influence, if not of authority, equal to a decision of a Court. Some of the questions, then at issue, are now in controversy, in this discussion; and the case and the speech itself have been alluded to from the bench.* Let us see if the difference between these two clauses of the Constitution, cannot be made clearer by a restatement, in connection with some extracts from that celebrated argument.†

One clause provides for the delivery of a person charged with crime, by one sovereignty, from its jurisdiction, to another sovereignty, for its jurisdiction, for the purpose of trial: which delivery is Extradition.

How could this characteristic of Extradition, namely: that it is international—escape the notice of tribunals; especially of one who, like Judge Sprague, (if we may infer simply from his reference, and not from the statements of his charge) had

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* See Judge Sprague's Charge.

Annals of Congress, 1799-1801, 596.

read Marshall's argument in the case of Robbins; and there seen these words?

"The case was, in its nature, a national demand, made upon the nation. The parties were the two nations. They cannot come into Court to litigate their claims, nor can a Court decide on them. Of course, the demand is not a case for judicial cognizance."

The other clause simply secures to the inhabitants of each State, the power of enforcing before the Courts in another State, a right which they enjoyed in their own; a personal right, that of property: which is no more Extradition, than the delivery to his owner, of a stray horse, the surrender to him, of his vessel at the wharf; and not legally, only in appearance, more Extradition, than the collection in one State, of a note due in another. It, as the law now stands, knows even no change of jurisdiction; for the whole process is not before the Courts of separate States; but in the United States tribunals, and by the officers of the Federal Government, whose sovereignty and jurisdiction stretch from the St. Croix to the Gila, as far even as the "Fugitive Slave Act" itself.*

This distinction between the personal right of property, and the State's right of sovereignty, the tribunals anxious to uphold the Act of Sept. 18, 1850, try in vain to pull down. Years ago it was established in our country's jurisprudence, by the strong hands of Marshall, when he said:—

"Individuals, on each side, claimed the property, and therefore, their rights could be brought into court, and there contested as in a case of law or equity. The demand of a man, made by a nation, stands on different principles."

In the case of a fugitive from service, the whole process is before a Court, or something that sits in its place.

These extracts, as well as the tenor of the whole argu-

* These characteristics of extradition were well shown by J. C. Woodman, Esq., of Portland, in an article published in the Portland Inquirer of Nov. 13, 1851. I must thank him for calling my attention to them.

ment, go further, and show that, where a personal claim is in contest; that, where the right of property is to be ascertained, there is "a case for judicial cognizance," "a case of law or equity;" and precisely at this point, we find ourselves able to reconcile into a harmonious unity, a real identity of principle, Marshall's early exposition of the one clause, with the later decision of the Supreme Court, upon the other, when they declared that it contemplated "a case arising under the Constitution." The great object of Marshall, in his speech, was to show that the case of a fugitive from justice, under a treaty, was not "a case" within "the judicial power;" and accordingly, that the Executive did not encroach upon the judiciary, when the President delivered Robbins over to the English government: and one great aim, and, I may say, the great aim of the Supreme Court, in Prigg's case, was to show that the case of a fugitive or an alleged fugitive from service, was within "the express delegation of that power;" and therefore, beyond the reach of state legislation. The law now becomes consistent and symmetrical. The very reasoning, by which Marshall established that the question of the delivery of Robbins, was "not a case for judicial cognizance," shows that the question of the delivery of an alleged fugitive from service, is "a case for judicial cognizance;" and before the half century expires, the Supreme Court give this inference their positive sanction. Both interpretations give a similar force and effect to the word "claim." Let, then, the tribunals busy to undermine the later opinion, keep some courage in reserve for their march fifty years backward to attack the earlier and long unquestioned authority; for it hinders their construction as much as the other.

Mr. Webster, in a speech, in the Senate, tells us:—

"There is a class of notions which run in a sort of periodical orbit. They come back upon us once in fifteen or twenty years."*

In the discussion of the statute of September 18, 1850, we have the return of a comet from a wider orbit, a re-appearance in the heavens, after a fifty years absence. Mr. Livingston, in his resolutions condemning the course of the administration in this case of Robbins, declared that the judiciary power extended "*to all questions*," &c. Mr. Marshall pointed out the error, and made it appear that its extent was "*to all cases*." The error, thus laid, slept till the administration of the statute now under consideration, revived; it and now, has arisen Commissioner Curtis to break down this distinction, from a new side, from an anxiety to restrict, instead of to enlarge, the scope of the judicial power. He declares that the judicial power does not extend "to all questions;" and seems to think that, therefore, one who is not a judicial officer, may decide "a case." He hardly shuns the very word used by Mr. Livingston; and leads himself directly into that statesman's error by speaking of "a class of *inquiries*,"† "confided to officers not constituting a part of the judiciary;" and in the course of his opinion, reasons from the "question" which the Commissioner of Patents decides, to the "case" which he was attempting to determine. He seems conscious of having entered a broad field of comparison; and complains that his duty led him where the lines of distinction became difficult to trace. He need not have lost his way, if he had been willing to remember, that everything which the Constitution calls a "case," must be decided by a Judge. The Virginia Jurist kept his head clearer than the Massachusetts Commissioner, and found no difficulty in

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* See Works, Vol. V., 886: California Public Lands and Boundaries.

† Trial of Thomas Sims, 40, 41.

following the line of distinction which the latter lost, and abandoned all hope of tracing. He says:—

"Whether a patent for land shall issue or not, is always a question of law, but not a question which must necessarily be carried into Court.*

Therefore, no analogy can be drawn from the determination of this "*question*" or the answer to this "*inquiry*," to the decision of a *case in Court*. Therefore, the Commissioner of Patents must not attempt to decide "a case arising under the Constitution." Why should he? Is he more judicial than the Land Officer?

Having broken down distinctions essential as these, it was not difficult for tribunals to go further, and disregard the differences between these two clauses, which have been pointed out in connection with the clauses themselves, the difference in the character of the parties to be delivered under each, and the purpose of their delivery, which makes the proceeding in one case, preliminary, and in the other, final; which is also to be found in the judicial opinions of our country. On the one side, the Supreme Court of New York, in their very entrance upon the consideration of a case under the one clause, say:—

"Civilized nations have seen the necessity and propriety of surrendering fugitives from justice, *that they may be tried* by the laws of the country in which the offence was committed.†

On the other side, Judge Story, for the Court, in the Prigg case, declares the purpose of the delivery to the master, to be, that he may have the "*immediate possession* of the slave and the *immediate command* of his *service* and *labor*."

Throughout Marshall's celebrated argument also, flames

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* Annals of Congress, 1799–1801, 612.

† In re Clark, 9 Wendell, 212.

For declarations of this purpose, still more emphatic than this, see the fuller extract from their opinion, in the Appendix.

out this purpose of extradition, which makes it preliminary. He declares that the crime charged "is not punished by sending the offender out of the United States;" and as one reason for delivering him over to Great Britain, that the Courts of the United States could not *try* the question of his guilt; and uniformly recognises the character of the fugitive and the nature of the demand, as necessarily and by inevitable inference of law, implying a trial before acquital or punishment. When tribunals under the Act of 1850, find any such trial implied in the statute, referred to in the papers in the case, and arising inevitably from the legal relations of the parties; then, they may assume an analogy between the two classes of cases, and then, they may talk and act as if such trial were to take place. At present, their empty guesses and vain conjectures, their balancing of probabilities and calculation of chances are only dishonest evasions of law and mockeries of justice.

CONCLUSION.

"Against the prisoner at the bar as an individual, I cannot have the slightest prejudice. I would not do him the smallest injury or injustice. But I do not affect to be indifferent to the discovery and punishment of this deep guilt."—*An Argument on the trial of John Francis Knapp: Daniel Webster.*

With so wide a difference between these two clauses, it may be asked, how is it that the idea of their essential analogy could have crept into the minds of Jurists and Courts and Commissioners? But this is not the only aspect of this matter, that needs a similar explanation. How is it that the line of distinction between final and preliminary proceedings should be so completely missed, as in the proceedings under the Act of 1850? How could it be dreamed even, that delivering a servant to his master, was a case of extradition? How could there come such a substitution of rights, as of a limited right of removal, in the place of an absolute delivery? How is it that the course of judicial decisions is bent back upon itself, and that the Courts of our country have doubled their track like a hunted hare?

If we turn aside from the narrow path of legal argument, to glance at the essential merits of the case, and get an answer to these questions, it is the saddest part of this history.

Only by such distortions of the law, can slave-catching be made sure, easy and cheap; and (I speak of physical strength) a strong pecuniary and political interest insists that unpaid bootblacks be returned to the brush. The Judge — how much more, he who usurps judicial functions in order to take jurisdiction over the case — who enters upon his official duties, willing, under any circumstances, to give a decision which shall strip a man of the attributes of manhood, and convert him into a chattel, which shall make him the goods, property, slave of another, first strips himself of that which alone fits him to decide the rights of contesting parties; he leaves behind him as he goes to his judicial seat, the best part of a Judge, his sense of justice; and takes the bench, with his mind bent to the performance of a base purpose. Henceforth, to him, the law has no symmetry nor system; and if we find in the reports of the proceedings, marks of inextricable intellectual confusion, or traces of something worse in the action of his mind, it need not excite our wonder or surprise. It comes by natural and easy process from his first step.

Facilis descensus Averni; and especially with a strong pecuniary or partizan influence around him, pushing him downward, he can, without difficulty, descend far enough, to say as a legal truth, that an officer having charge of a fugitive from justice, for the purpose of transporting him from one State to another, "can treat his prisoner as he chooses;"* to admit that the scale of compensation, fixed by a statute, was so improper that he would not touch the fee prescribed, and yet, see no constitutional objection to such a bribing enactment;* to repeat an authoritative opinion of a supreme tribunal, and then, give to its essential part, no weight, no pretext or particle of respect;* to make

* Trial of Thomas Sims, 30, 40, 40.

a distinction* between "the substantial facts of the case," and the fact that the prisoner was a slave,† when the main fact attempted to be proved before him, was, that the prisoner was a slave, and the statements of the witness, which he recapitulated and on which he based his judgment, were statements, that he was the slave of the claimant. Losing sight of the essential characteristic of a final judgment,‡ he may substitute an attaching incident,§ in order to obtain a definition which suits the present emergency, or shrinking from a legal investigation of the provisions of one statute, the constitutionality of which was before him, awaiting his decision, substitute in its stead the repetition of the names of members of the government, at the time of the passage of a statute somewhat similar:‡ or, if I may borrow the use of a word from a fresh theologian, he may "import" from his own laboring brain, into the efforts of the counsel, the doctrine of Stipulations;† and then, as he strikes truculent blows at this nightmare, convince himself that he is battering down their arguments; and perhaps, he may, with cold-blooded indifference, turn his back upon the principles of law, and attempt to rebut a general objection, with a special answer like the following:—

"If the prisoner is the identical person mentioned and described in this

* Undoubtedly there is such a distinction — broad enough to exclude from the case all evidence going to prove the fact of slavery. The perversion consists in recognising it, and then, giving it no weight.

† Trial of Thomas Sims, 28, 43.

‡ See Judge Sprague's Charge.

§ In earlier times, judgments rendered in foreign countries were not executed within the realm of France; and subjects of that realm might, in French courts, contest their rights anew. Judge Sprague's definition of a "final judgment" would exclude an action between Frenchmen, in an English court, under the old French ordinance; and we should see proceedings precisely similar — final for English, and preliminary for French parties. Perhaps, the trial of actions between the latter might be transferred to Commissioners!

transcript of a record, as having escaped from Georgia, while owing service (and it has been proved to me, by evidence wholly independent of the record, that he is), his absence from the State where the evidence is directed by law to be taken, so that he could not be served with notice, if he was entitled to it, was in his own wrong, and he cannot now complain that he had no opportunity to cross examine the witnesses."*

If he does all this, and even more than this, besides all that has been exposed in this essay and elsewhere; it is all germane to the matter in hand. It is not so much the special wickedness of a single individual, as it is the necessary working out of the nation's general guilt:

"that foul sin gathering head
Shall break into corruption."

But this essential element in the case, lies almost without the limits of the present argument: and we have to do with other elements within those limits, which result therefrom, and sorely aggravate the central outrage: aggravations, which did they touch any other flesh than that of a marked and oppressed race, would

"move
The stones of Rome to rise and mutiny;"

and which, now, even in the race accidentally exempted from their operation, find enough of mother's milk to turn to gall against their despotism. There is, at present, no legal barrier between actual liberty and actual slavery for any man, save the hasty decision of a mere ministerial officer. What a Southern Judge, with a nice sense of justice, strangely out of place in the enforcement of the cruel law which came from his lips, very fitly termed the "impassable gulf" between freedom and slavery, Congress has bridged for us all, with the simple certificate of a Commissioner. When did the Anglo-Saxon race ever leave their liberties so loosely guarded before? From a proceeding that involves in its

* Trial of Thomas Sims, 44.

issue all that makes life in this world worth living for, and also the faint glimpses of light

"That dawn on us here,"

from the life which is to come, the national legislation has taken away the watchfulness of a jury, the presence of a judge and the cross examination of witnesses; and made the decision of the officer who sits in the place of a judge, based upon no trial, (in the words of one of its own tribunals) "completely unassailable;" and yet, the regularly appointed Courts of Justice shrink from a thorough investigation of the statute. There have been legal investigations in our country, which do honor to the American judiciary; but they were marked with a bold fearlessness of consequences, affecting, as they might, any political or pecuniary interest, which one looks for in vain, in any of the judicial opinions in relation to the restoration to their masters, of fugitives from service.

Sad, indeed, is it to a loyal man, one who firmly believes in the justice and beneficence of the system of law, who loves to lean upon the integrity, the moral courage and the wisdom of the Courts, to see them refusing to enter upon a thorough judicial investigation, to which the ablest arguments have invited them, and towards which, the wounded moral sensibilities of the community have impelled them; to see them declining accurately to weigh, and carefully to compare with the fundamental principles which govern the administration of justice, the provisions of an odious statute; and no matter how great the breach that statute is making in our system of judiciary, nor how many of the best safeguards of personal rights it sweeps away, to meet these objections, ably as they have been urged, with the answer, that, before this statute, there was another very much like it, and that was once decided to be constitutional, and therefore, of course, this must be constitutional also.

Sad, however, as it is, I think I have seen an amusing and even ludicrous parallel to this course of judicial reasoning. I have not long since been interested in the report of a certain engineer, who had been employed to survey a route for a proposed railroad. A quaint acquaintance suggested to me, as I read to him the report, that the members of this profession generally find a route, with gentle grades, few short curves, through an easy soil and a country furnishing a large amount of way business. But this seemed an unusually favorable route, or at least, the report of it was unusually favorable. Among other attractive features of the country, the engineer says, if I recollect aright, that he found two extensive bogs occupying a large portion of the line of the proposed route, which he had not examined; but if they proved to be of firm and suitable soil, the grading of the road would cost a comparatively small amount. My critical friend, who has had some experience in investments of this sort, remarked that the engineer did not seem prepared to answer the question, "Is it good, substantial bogging?"

The Courts seem to have adopted the same formula. If the Act of 1793 was constitutional, they say, this must be so, also. But they have a little better excuse for presuming a favorable answer to this preliminary question. They assert that the rails of the recent road are laid on the bed of an old track, and "the 'bogging' is certainly good and substantial." Jonathan Trumbull, John Adams, Thomas Jefferson, George Washington, and the Congress of 1793 have all gone safely over it. The highest Courts of several States have crossed it, at different times; and in the Prigg case, it held up the whole bench of the United States Supreme Court.

Ah! Fellow Countrymen, this is a sad delusion. There is here a dangerous, dreadful bog. The Congress of 1801 were mired here; and here have since been lost, the trial by jury, the sacredness of the judicial office and the best part

of the law of evidence;* and now, a mad administration, bent on gaining notoriety for its personages, is, at the peril of the country's peace, and to the destruction of innocent life,† sinking in this same quagmire, that which is most valuable to a people; without which, a nation ought not to hold up its head among the nations of the earth, its moral character.

Is there upon the bench of all our Courts, no legal engineer who will try the soil of the route; who will ascertain and mark the boundaries of this bog, that the rails may be removed to the solid ground if there be any; and if there be no solid ground; if the main thing to be done, be not in accordance with, but contrary to a system of who esome law made for the government of a free people; if the whole ground along the line be bog, nothing but hopeless bog,

"tenebrosa palus Acheronte refuso,"

let the route be, at once and forever, abandoned.

Under any circumstances, let the train run no longer, at the present expense of sacrificing the most valued safeguards of law, and to the serious injury of our national character. Let the people no longer be perplexed, by seeing the most solemn issue, the liberty of a man, irreversibly decided, without the presence of a judge, jury or witnesses.

Ye who believe in justice, still cling to your faith and the hope it inspires. The Courts will not always turn a deaf ear to arguments. If they do not immediately walk in the

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* See Appendix II., for some comment upon the manner in which the evidence is taken under this statute.

† At Columbia, Pa., on the 29th of April, a police officer from Maryland, attempted to carry off a person as a fugitive slave, and in the scuffle that ensued, shot him. This seizure may not have been attempted under the color of this statute; but it may, undoubtedly, be attributed to the fresh stimulus which the business of slave-catching has received from its passage, and from the whole course of the administration in relation to that business.

light of common justice and a LAW HIGHER than human, they will at least, ere long, return to the safe line of legal precedent, and once more, follow the established authorities. The nation is not so thoroughly and hopelessly corrupt, as this single statute would lead one to suppose. Politicians may declare the series of measures, of which this Act forms an essential part, an abiding adjustment; and haloo their "finality," through the country's breadth, till their voices are cracked with this "shouting and singing of anthems;" and men upon the bench, may pronounce the constitutionality of this statute, a fact already fixed; but they cannot have their course. Above their arbitrary will is the Law, and the Constitution; and this engine of oppression must give way to these; for, if this Act of Congress be suffered to stand, then, there is a beginning of the end of American Law, and the vigor and virtue of the American Constitution, are fast passing away. It cannot always stand. It will yet be dropped from our system of laws, as a thing out of place, a deformed monster "born an age too late;" and the administration of justice shall resume its wonted course, and again, flow in those deep channels which centuries have worn for its currents.

We shall, then, see those proceedings which have for the last year and more, under the color of Law and the assumed shelter of the Constitution, committed the last outrage upon humanity, stripped of all their present subterfuges and excuses. Then, the action will lie

"In his true nature,"

a lawless kidnapping; and in vain, shall men attempt to hold up clean hands before an outraged community, and to cry "Korban, Korban." It was our constitutional duty. The Law made us kidnappers. The Constitution forced us to enslave a MAN. The Union compelled us to be brothers

to the slavestealer on the Guinea Coast. The Law they have outraged, the Constitution they have violated, and the Union they have dishonored, will, each and all, spurn them from their sanctuaries; and with a reviving sense of right, a just public indignation will overtake those, "who had a part in planning, or a hand in executing" these deeds of midnight darkness.

Then, men, whose brows flushed with shame, and whose eyes filled with tears, at the sound of wrongs which were committed in the name of their country, and by pretext of their authority, will lift up their heads, and say, exultingly. The Law was innocent. The Constitution was not an accomplice. The Union had no part in that guilt.

APPENDIX I.

I have been made aware that the practice of the executive authority of several States has been different from what is described in the text.* But the words of that portion of the Act of 1793, which relates to fugitives from justice, are not ambiguous, but plain; and can bear no other construction than that given in this essay. It is also an interesting fact, that while the American Constitution providing for extradition between the several States, requires only a *charge* of crime, the treaties between the United States and Great Britian, made by Jay in 1794,† and by Webster in 1842,‡ contain altogether different phraseology; and, in express words, require that there shall be, in the country where the fugitive is found, *proof sufficient, according to the laws of that place, to authorize his commitment for trial;* and the latter treaty, apparently framed with more minute care, expressly provides for such a *preliminary examination* as Judge Story refers to. To both these treaties is Judge Story's comment strictly applicable, but not to the clause of the American Constitution.

It will hardly fail to be noticed, that the provisions of these treaties, in the framing of which, each country jealously watches for the rights of its citizens, contain safeguards for personal liberty and security, which the constitutional clause upon the same subject,

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* Ante.

† American State Papers, Foreign Relations, Vol. I., 525.

‡ Webster's Diplomatic Papers, 236.

sadly lacks. A Governor, unwilling, upon frivolous grounds, to expose the citizens of his State, or persons within its jurisdiction, to a distant removal and a trial in another State, may feel, perhaps, that he is not wholly without justification, if, in spite of the language of the Constitution and the Act of 1793, he follows the course indicated by Judge Story, though the language of his Commentaries may be made to imply an actual examination of the person demanded, before the executive authority of whom he is demanded, or at least, an examination before a magistrate in the State where the fugitive is found; to which extent of watchfulness I think no Governor has ever yet carried his scruples.

A case of this kind occurred, when, in 1842, Governor Davis, of Massachusetts, in reply to a demand from the Acting Governor of Virginia, refused to deliver over George Latimer to be tried for theft, alleging that there was not proof sufficient to raise a presumption of guilt; and in the conclusion of his reply, he seems to feel that his justification is to be found in the nature of the circumstances and the necessity of the case, rather than in a strict interpretation of the words of the Constitution. He says:—

"The tendency has been so strong to multiply these demands, and they come in such questionable forms, that I have felt it to be my duty, in repeated instances, to decline compliance, believing that it was never the design of the Constitution to subject the people to this process, for trivial offences, or upon demands which contain no charge raising a presumption of guilt. I am persuaded that nothing short of this, can protect them against oppressive arrests."

The unguarded provision of the Constitution had been perverted, and he felt compelled to resist its abuse.

On the other hand, there have been Governors who have not hesitated to follow the letter of the Constitution and the Act of 1793, as stated in the text. The Governors of Maine, who refused to deliver up Philbrook and Kelleran, in compliance with a demand from the Governor of Georgia, did not intimate that any evidence of guilt, other than so much as is necessary as the basis of a charge, was requisite. Governor Dunlap answered that there was in the papers brought to him from Georgia, no constitutional charge, "the

allegations of the affidavits," says he, "do not, in my judgment, constitute such a charge as would justify me in surrendering the supposed fugitive; for, "By the Constitution of the United States, no warrant is to issue, except upon probable cause, supported by oath or affirmation;" and "In the case under consideration, it is not asserted that there is probable cause, nor are facts or circumstances presented, from which probable cause can be inferred." It will be seen here, that, when the "executive authority" only indirectly inquired into the amount of the evidence (that is, in order to ascertain merely the legality of the papers), he estimated the amount requisite differently from Judge Story, deeming, in this indirect inquiry, evidence, which would justify the issuing of a warrant, sufficient, while that authority would directly demand enough to justify a commitment for trial.

When, in this same case, this objection was removed, and a "copy of an indictment found" furnished the lawful evidence of a charge, Governor Kent deemed the case so far within the description of the clause; and only objected that the second necessary fact had not been proved, viz: that they had "fled from justice." The opinion of the Supreme Court of Maine was asked at this time, and they answered that it was the duty of the Executive to deliver the demanded citizen, upon mere indictment, and satisfactory evidence that he had fled from justice; never intimating that the question of guilt or probability of guilt was left to the executive discretion.*

A subsequent Executive of Maine has had before him, the very question above discussed in connection with Judge Story's comments; and he not only followed the course stated in opposition to that authority; but most emphatically insisted that neither the Constitution, nor the Act of 1793 left him any liberty to do otherwise. Governor Hubbard, in a message to the Senate, of June 3, 1850, communicating to that body an abstract of the case, and his opinion and decision on the same—of the Wentworth's, demanded by

* Message of Gov. Kent to the Legislature of Maine, January 8, 1839.

the Governor of New Hampshire, as charged with the commission of crime in that State, says:—

"It is not required that the person be convicted of crime, but *simply* that he be *charged* with its commission."

"The conditions necessary, then, to authorize the delivery up, are the identification of the person charged; that he be charged with treason, felony or other crime; that the requisition be from the executive authority of the one State, upon the executive authority of the other; and that it be accompanied by an indictment found or an affidavit made, charging the crime, and certified by the Governor as authentic."

"I have, therefore, deemed it my duty to comply strictly with the letter and spirit of the Constitution and law of the United States, touching this subject. I have not felt authorised to go behind the record to look into the facts connected with the case before me. Such a procedure would seem disrespectful to a sister State, would bring our jurisdiction in conflict with hers, and tend to acts of retaliation."

Possibly, it may occur to some who read the above extracts from his message, that Gov. Hubbard's opinion would be entitled to more weight, if he had not omitted from his catalogue of conditions necessary to authorise a delivery, one most essential requisite, viz: proof, that the person has fled from justice. But something may be pardoned to an ardent desire, on his part, to fulfil duties imposed upon him *by the Constitution* of the *United States*, to the performance of which, he, with a large portion of the community, had then felt themselves recently recalled. If his zeal seems to outrun the Constitution, it is not a solitary or singular enthusiasm. The soundness of his opinion in other respects, so far merely, as he differs from Judge Story, can hardly be questioned. Another extract from this message will make unnecessary, on my part, any attempt to explain any statutes of the States, apparently contradicting this view:—

"There is, as is believed, no law of this State, which, upon a fair construction, in any degree conflicts or controls the above requirements. Were there any, such law must be unconstitutional."*

The Supreme Court of New York, having this question brought before them, gave the following as their opinion:—

"This matter has usually been arranged by treaty; but, where no treaty

* Acts and Resolves, 1850, 316.

exists, the comity of nations requires that offenders against the laws of one nation, shall not find a sanctuary in another. In such cases, a state or nation, which is required to surrender an individual who is under the protection of its own laws, owes it to itself as well as the individual concerned, to institute an examination into the facts alleged to constitute the crime, and to surrender the person charged, if, upon such examination, there appears satisfactory evidence of guilt. *Had our Federal Constitution and laws been silent on this subject, and no conventional arrangement existed between the several States composing our confederacy*, it may be conceded that the practice arising from the comity of nations would be applicable; and *before we would surrender any person demanded as a fugitive from justice, it would be our duty to examine into the facts of the alleged crime, and be satisfied that no reasonable doubt existed as to his guilt.* But, under our federal government, this matter has been regulated, and we are not left to the uncertainty arising from an inquiry in one State into the particulars of an offence committed in another."

After repeating the words of the Constitution, the Court continue:—

"Here, then, is the law on the subject, a positive regulation and tantamount to a treaty stipulation; and we are not to resort to the comity of nations, for our guidance. Every person, who is *charged* with an offence in any State, and shall flee to another State, shall be delivered up. It is not to be shown that such person is guilty; it is not necessary, as under the comity of nations, to examine into the facts alleged against him, constituting the crime; it is sufficient that he is charged with having committed a crime."

"But whether he is guilty or not, is not the question to be decided here it is whether he has been properly *charged with guilt*, according to the Constitution and the Act of Congress." "Whether the prisoner is guilty or innocent, is not the question before us; nor is any judicial tribunal in this State charged with that inquiry. By the Constitution, full faith and credit are to be given in all the States, to the judicial proceedings of each State. When such proceedings have been had in one State, which ought to put any individual within it, upon his trial, and those proceedings are duly authenticated, full faith and credit shall be given to them in every other State. If such person flee to another State, it is not necessary to repeat in such State to which he has fled, the initiatory proceedings which have already been had, but he is to be sent back to be tried, where the offence is charged to have been committed, to have the proceedings consummated where they were begun."*

* In re Clark, 9 Wendell, 210.

The foregoing extract from the opinions of two Governors, in cases of actual practice, and this last from the opinion of the Supreme Court of New York, in a case pending and argued before them, precisely and explicitly contradict the statement of Story's Commentaries, and fully sustain the statement of this essay.

APPENDIX II.

The manner, in which the evidence is taken in the State whence the person claimed is alleged to have escaped, to prove that he was held to service and had escaped, has not been commented upon in this essay; because fundamental and fatal objections to the statute may be urged without touching that topic. A single effort to defend this part of the statute, which I find in "The Works of Daniel Webster, Vol. II.," is worthy a moment's attention. In a speech at Buffalo, May 22, 1851, he said, and he repeated the same argument, afterwards, to the "Young Men of Albany:"—

"In the second place, when a claimant comes from Virginia to New York, to say that one A. or one B. has run away, or is a fugitive from service or labor, he brings with him a record of the Court of the County from which he comes, and that record must be sworn to before a magistrate, and certified by the County Clerk, and bear the official seal. The affidavit must state that A. or B. *had departed* under such and such circumstances, and *had gone to another State;* and that record under seal, is, by the Constitution of the United States, entitled to full credit in every State."

This statement makes the unconstitutionality of this part of the proceedings, as clear as the day. For it has long since been settled, that, in order to bring a judicial proceeding in one State within the scope of this clause of the Constitution; in order to give it any force in another State, it is necessary that the party to be affected by it, should have been,

1. "Within the jurisdiction of the court which gave it;" and

2. "Duly served with process," while within that jurisdiction.*

Let us see how this would operate in the case of a fugitive from service or labor.

I. *As long as he remains in the State* where he is held to service, and so within the jurisdiction of its courts, so long there has been no escape, and by the statute, no evidence that he is held to service can be taken; and in no case, can it be proved that *he has fled from that State into another.*

II. Besides this legal obstacle, there is a practical difficulty, quite as hard to surmount, in the way of those who would bring the "the full faith and credit" clause of the Constitution, to the support of this part of the Act of 1850. The party must be duly served with process. How will that work? The notice must be given before the evidence is taken; and as, after the arrest, the person seized is to be carried "forthwith before" the court where the evidence is to be used; the notice must also, necessarily, precede the arrest. Imagine a fugitive from slavery, in a northern State (if that were legally possible) to receive lawful notice — twenty-four hours for every twenty miles distance, perhaps — that on such a day, at such a place in a southern State, Georgia or Alabama, for instance, before a named court of record or Judge thereof, evidence will be taken to prove that he owes service to such a master, and has escaped from the same; to the end that he may be retaken and delivered to him again. A fugitive so notified, when the officer came to arrest him, would rarely be found within his precinct. On the other hand, instead of attending the taking of the testimony or waiting for the arrest which would follow it, he would, more probably, on or about that day, be under the jurisdiction of English Law, and perhaps, sunning himself in the tabernacles of Shadrach's court, at Montreal.

It is interesting to trace a man of so large intellect, and so able a lawer as Mr. Webster, further in his opinions upon this subject. As has been stated in the text, in the early part of his Newburyport

* Hall *v* Williams, 6 Pick., 245; where the cases are collected.

letter, he supported the "preliminary" hypothesis; and it is especially interesting to mark the method and means of this support. He does not say, there are probabilities that there will be a further trial as well as practical difficulties or improbabilities, and the government "has just as clear a constitutional right to look to one class of probabilities, as to the other."* He, evidently, does not consider this *computationen rerum fortuitarum*, as within the line of legal logic, or appropriate to judicial reasoning. He avoids it; and does that, which alone can help forward the argument. He marches boldly up to the line; and carelessly misstates the fact. Speaking of the fugitive from service, he says:—

"He too, is only to be remitted *for* an inquiry into his rights and the proper adjudication of them, to the State from which he fled:" "*that* his liabilities and his rights may be there regularly tried"

He declares that the removal is for the purpose of a trial; and evidently knows nothing else, that will make the proceeding preliminary. When his assertion of fact fails, the weight of his authority falls against the statute.

He declares that the fugitive is sent back *for* trial. It is no such thing. No such purpose is named or implied, either in the Constitution, or the statute, or the papers in any particular case. On the other hand, a contrary purpose is manifest in each of these three. The fugitive is not claimed for trial; nor examined for trial; nor certified for trial; nor sent back for trial. General Putnam's letter to the British commander, furnishes the best model, whereon to write his character as he passes through the various stages of this process. He is claimed as a slave; arrested as a slave; brought before the tribunal as a slave; tried as a slave; certified as a slave, and removed as a slave. In the light of actual history, we may also add:—

P. S. He has been beaten and sold as a slave.

All this is, however, from the first part of Mr. Webster's letter. Towards its close, he writes that "a main and perhaps the only

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* Trial of Thomas Sims, 43.

insuperable" difficulty in the way of a trial by jury for the alleged fugitive, had been created by the States themselves; and subsequently he introduced into the national Senate, a bill providing for such trial. Yet, he had declared that, under the Constitution, the proceeding was to be "preliminary and summary;" and that the fugitive was to be sent back whence he fled, *for* trial. Is it defending the Constitution, to interpolate a jury trial into what that instrument meant should be a summary process, "in order to allay excitement and remove objections?" "Call you this backing?"

Since the letter, from which these extracts are taken, was written, Mr. Webster has again attempted the defence of this statute.* He last enters the arena from still another door. As soon as he lifts up his voice in the discussion, he ignores the "preliminary" hypothesis. He says — Fellow citizens: the provisions of this statute are fair for the fugitive and constitutional. Upon my reputation as a lawer, upon my annual income, sometimes more, sometimes less, but never as low as "thirty pounds," I say to you, they are constitutional. They are so, not because there is to be, hereafter, a final trial of the alleged fugitive's liabilities and rights, in the State to which he is sent; but because the question has already been tried there; and the claimant brings with him the record of a court, that such a man, described by such marks, owes him service, and has escaped. There is nothing more to be done, but to seize the individual, find the marks specified, and identify the person. This can be done without Judge or Jury; and there is an end of the matter.

There is one explanation of contradictions like this in arguments in support of the Act of 1850, which recurs at their every reading. To the minds of its advocates, the provisions of the Constitution have left things loose, floating and chaotic. They seem to think, that the Constitution has fixed nothing, and established nothing. The fact is otherwise. The Constitution is definite in its phraseology; and needs only a fearless investigation of its clauses to determine sat-

* Extract from his speech at Buffalo, Ante, 124.

isfactorily the questions which arise under them. One would think that Webster at least, might escape this confusion. Even if others upon the same side could not, we should expect that he would talk coherently and like a lawyer, upon a question of law. But, when he debases his intellect to the support of this iniquitous and unconstitutional statute, his head swims and his brain grows confused.

"He
Reeled as of yore beside the sea,
When blinded by Œnopion,
He sought the blacksmith at his forge,
And climbing up the mountain gorge,
Fixed his blank eyes upon the sun."

AN ARGUMENT

ON THE

"FUGITIVE SLAVE ACT,"

BY

THOMAS H. TALBOT,

OF THE CUMBERLAND BAR, MAINE.